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INTERNATIONAL GOOD FAITH *

"Love thy neighbor and be joined to him with fidelity" (Ecclesiastes 27:18).

IN everyday life, my dear brethren, few traits of character are more esteemed than that of trustworthiness. We say of the trustworthy man that his word is as good as his bond. In business or social life, we feel secure when called upon to deal with him. For we know that his life is ruled by fidelity. He will be faithful to his obligations and promises without being watched. To live in a community where such men prevail is to know security and peace in community life. Fidelity is indeed the foundation of justice and the work of justice is peace.

On the other hand, which of us would choose to live in a community where each of our neighbors was a law unto himself? Where each was armed with deadly weapons? Where no one's word could be trusted, and the only recourse would be to police and courts dominated by the most powerful and the most ruthless. From such a community, all peace and security would be banished. Fear and suspicion would fill our day; and our nights would be troubled with worry and distrust.

What is true of a local community is likewise true in large measure of the world community.

* Sermon delivered by Most Reverend Bryan J. McEntegart, D.D., Bishop of Ogdensburg, N. Y., at the "red" Mass in the National Shrine of the Immaculate Conception at The Catholic University of America, Washington, D. C., Sunday, January 27, 1946. The text was introduced into *The Congressional Record* of January 28, at the request of Hon. John W. McCormack, Representative from Massachusetts. The text was also published in Italian translation in *L'Osservatore Romano* of March 25.

I

Today distrust hangs like a cloud over the world community, darkening all prospects for international cooperation in the interests of peace. Its benumbing influence is to be felt everywhere in the public attitude toward the main problems in international relations.

Take for instance, the negotiations concerning atomic energy. President Hutchins of the University of Chicago speaks for many when he says that the world has only a slight chance of averting the horror of atomic war. That slight chance, he believes, lies in a rate of moral progress during the next 5 years far beyond anything that has ever been dreamed of. For that purpose, he would marshal the instruments of education throughout the world to develop in all men a common tradition, common ideals, and common ideas. "The task," he states "is overwhelming and the chance of success is slight. We must take the chance or die."

But even apart from the atomic bomb, public opinion is filled with distrust. We see it in the agitation for abolition of the veto power in the United Nations Organization; and just as clearly, we see it in the stubborn efforts to retain that power.

Distrust has stirred bitter controversies over the occupation policies in Germany and Japan, and it has influenced deeply the public reaction to the conflicts in Palestine, Iran, and Indonesia.

Nor does its work stop there. The failure to formulate any program for the gradual disarmament of all nations, and the clamor throughout our own land for universal military training, the little brother of national conscription, are but further evidence of this same pervading spirit of distrust.

II

Now, to the student of history, all these examples are but surface indications. They are only the outcroppings of a distrust which is rooted in more general causes. We must search deeper for those underlying causes.

In the first place, the roots of public distrust are grounded in the utter lack of public confidence in the promises of totalitarian states. The monstrous crimes of Nazism and Fascism are still vivid in the public memory. Neither have people forgotten the other examples of totalitarian aggression to be found in recent history.

They know that in violation of solemn promises, the sovereignties of the Baltic nations were sunk without a trace, and even without public remonstrance from world leaders. They know that in violation of solemn promises Poland has been partitioned, its recognized government scrapped and a misrepresentative regime installed and maintained by force. And they know, too, that today the people of Balkan countries live in terror behind an iron wall of consorship.

With the logic of common sense, the public does not indulge in hopes that totalitarian governments will afford to other peoples the rights they refuse to their own subjects. And they are convinced that slave labor, concentration camps, and the mass banishment of innocent people are evil, regardless of what nation sanctions them.

Is it any wonder then, that the peoples of the world lack confidence in the promises of every totalitarian regime?

Furthermore, the roots of public distrust are also to be found in the disappointing history of other efforts at international cooperation. Still fresh in memory is the break-down of the League of Nations when it was faced with questions of vital import to the peace of the world. Men remember well the rapid succession of international treaties which were made between the two world wars and broken almost as soon as they were made. Nor does it serve any good purpose to ignore the shock experienced by our own people and those of other lands, when they heard the Atlantic Charter, that inspiring statement of moral objectives, minimized, disparaged and whittled down by its very authors.

Over and beyond these examples of history, the common people of the world sense that national spokesmen and poli-

tical philosophers have done tremendous harm to the validity of international agreements. Stealthily, determined efforts have been carried on to divorce international relations from morality.

From many quarters comes the doctrine that the will of each state is supreme and subject to no higher law. International agreements, it is contended, are made to serve only the utility of a state; and such agreements are revocable whenever that state considers them no longer useful to it. Fine words and clever phrases may bolster the plausibility of such a doctrine. But the common sense of mankind brands it for what it is—international anarchy.

Another school views all law as only an expression of force. Men and nations, they tell us, are entitled only to the rights which they can hold by force or artifice. The common sense of mankind rightly names this doctrine, the "law of the jungle," and labels it unfit for human relations.

In fine, the people are distrustful because deep down in their souls they sense in recent efforts at international cooperation the lack of an essential element. They know that charters, covenants and treaties are only so many worthless scrolls unless interwoven in the text and standing behind the signatures—there is legal recognition of an inviolable moral obligation. And common sense tells us that nothing is inviolable; if there be no God.

III

Three thousand years ago, Plato wrote: "If God presides not over the establishment of a state; if it has only a human foundation, it cannot escape calamity." Five hundred years later, King David, with divine inspiration, wrote: "The fool has said in his heart: There is no God."

And again: "Unless the Lord build the house, they labor in vain that build it." Today, 25 centuries after David, the truth and the wisdom of his words are evident in the tragic folly of men planning for the peace of all mankind without reference to God, the Maker of mankind.

The existence of God and His supreme dominion over the world is not a theory or hypothesis which men can accept or reject at will. It is a stark fact. To deal with human relations without taking that fact into consideration is folly. One might as well try to draw the map of the United States without reference to the Atlantic Ocean, or to write the history of the United States without reference to the Constitution.

If God is ignored, if we do not look for the true, the good, and the right in the nature of God, where shall we look for them? Politics will give us the answer: To the State. "The true," "the good," and "the right" will be what each State says they are. And when these little gods differ, the most powerful will make itself the almighty god of the human race. No. There is only one moral code of universal and everlasting application. The rule of right, the standard of truth, and the norm of good are determined by the nature of God. They cannot be found apart from the one true God.

How poignant, then, are the searching words of that valiant woman of China: "Religion, on which the doors of diplomacy seem to have been slammed, is the main pillar of civilization. Without it, there can be no international righteousness, no justice, no common decency, no guaranteeing of the honor of the pledged word."

Shortly after our entry into the war, our late lamented Commander in Chief made this prophecy: "We shall win the war, and in victory we shall seek not vengeance but the establishment of an international order in which the spirit of Christ shall rule the hearts of men and nations." One need not grope for the objectives of the spirit of Christ in human affairs. From a hillside in Galilee, the Son of God gave mankind the answer in words that come ringing down through the centuries: "Seek ye first the kingdom of God and His justice, and all these things shall be added to you."

The first step toward world order is to acknowledge in reverence and obedience the kingship, the dominion of God over human affairs, national and international.

The second step is to see that the instruments for the ordering of men's actions are in accord with His justice, that is, with the law written in man's nature and later given to us mainly in the Ten Commandments.

The chief instrument set up to secure the peace of the world is the United Nations Organization. At present, it is little more than an alliance of victorious powers. But it is all that we have and we must build on it. With good will it should be possible to transform it into a real organization under law of the international community. It should be possible, too, through its agency to develop and proclaim the provisions of international law in accordance with the true norms of justice.

In our own country the status and powers and prestige of the Supreme Court came to be clearly recognized only after years of conflicts and resistance. In time, too, may we not hope that the World Court will develop into a court to which all justiciable disputes among nations must be referred — a court to which the provisions of disputed treaties shall be submitted for just interpretation, or, where necessary, for equitable revision.

Ultimately, however, the success of the United Nations Organization will be measured by its progress toward two great goals. They are: First, the sincere adoption by all nations of an international bill of rights for individuals and for minority groups; and, second, the adoption by all nations of a program to reduce armaments gradually and to abolish military conscription.

When these objectives are achieved, and only then, may men feel with any assurance that the instruments of world order are in line with His justice.

IV

God has placed it within the power of the men of our day to introduce a new era—an era in which nations will live together in justice and charity. The deepest hope of mankind is for a world at peace, a world of sovereign states co-

operating to insure to all men the full enjoyment of their rights, a world of free men and free nations with their freedom secured under God and the law.

Along the hard road to that goal the nations may be called on to make many sacrifices which today seem great, but which, in the light of God's justice, are necessary for the welfare of the human family. Unjust trade barriers, the unfair advantages that go with might and wealth, the idea of unlimited sovereignty — all of these must be either rejected or readjusted in accordance with God's principles of justice. As we move along that road to understanding and unity, let us share the reverence and faith of Tennyson's prayerful words, timeless and for all humanity:

> Our little systems have their day;
> They have their day and cease to be.
> They are but broken lights of Thee;
> And Thou, O Lord, art more than they.

Today, as we stand at the threshold of a new era, it is a heartening sign for the future that men, such as those who make up this congregation, should gather around the altar of God to offer their tribute of worship to Him, and to draw from the sublime sacrifice of the mass divine guidance and divine grace. You seek divine guidance that you may see more clearly God's purpose in a tangled world. You seek divine grace that you may, with courage and with loyalty, pursue that purpose in the cause of justice among men and nations.

May the Holy Spirit consecrate your labors in the sacred task of laying those foundations of fidelity and trust upon which rest the future peace and security of mankind, and now, in benediction, I leave with you the divine promise:

"My son, forget not my law; and let thy heart keep my commandments. Let not mercy and truth leave thee; put them around thy neck and write them in the tables of thy heart, and thou shalt find grace and good understanding before God and men."

AUT-AUT CAUSAE *

(Freedom to Marry Established in Complex Cases Involving a Doubt and a Dilemma)

THE chief purpose of this paper is to provoke discussion. The cases to be considered are practical. The solutions proposed will in some instances appear unusual. The author however believes there is some justification in Canon Law and in the "*praxis ecclesiae*" for arriving at the suggested solutions.

An "*Aut-Aut*" case may be defined as a canonical disposition of a complex case in which the nullity of a marriage (or the free status of the Plaintiff) is certain, but when the precise impediment causing invalidity (or the precise reason for a declaration of the "*status liber*" of the Plaintiff) remains a matter of insoluble doubt.

Without going into detail for the moment—but for the sake of clarification—one may be permitted to cite a case in which the nullity of the marriage is certain but the precise impediment causing invalidity is doubtful. Paul, a child of Catholic parents and allegedly a baptized Catholic himself, married Ruth, a baptized non-Catholic, in the year 1917 in the presence of a non-Catholic minister. After thorough investigation, the alleged Catholic baptism of Paul in infancy remains a matter of insoluble doubt. The Judge is confronted at the same time with a doubt and a dilemma: if Paul was baptized a Catholic in infancy, then his marriage to Ruth is invalid by reason of Defect of Canonical Form of marriage; if—on the other hand—Paul was not baptized in infancy, then the marriage is invalid by reason for the diriment impediment of Disparity of Worship.

* Paper read at the Regional Meeting of the Canon Law Society of America, Cleveland, Ohio, December 27, 1945, by Rev. Louis A. Wolf, Defensor Vinculi of the Cleveland Diocesan Tribunal.

An example of a case when the freedom of the Plaintiff to contract a new marriage in favor of his Faith is certain, but when the specific reason for the declaration of his free status is doubtful, would be the following: Paul married Ruth. The investigation proves that Paul was never baptized prior to his recent Catholic baptism long after his separation from Ruth. Ruth is proved never to have been baptized at any time in her life. Interpellations were made of Ruth and answered negatively. Ruth, however, was previously married to another before her marriage to Paul. The religion and free status of her first husband remain matters of insoluble doubt. Since one of the conditions for the application of the Pauline Privilege is a *valid marriage* of two infidels, the case reduces itself to the following dilemma: if Ruth's first marriage was valid, then her marriage to Paul is invalid, by reason of the diriment impediment "*Ligaminis*"; if—on the other hand — Ruth's first marriage was invalid, then the Pauline Privilege would now be applicable in the case of Paul. In other words, the freedom of Paul to contract a new marriage in favor of his Faith is certain, but the precise reason for the declaration of his free status remains doubtful.

Before one discusses any one particular type of "*Aut-Aut*" case in detail, it is in order to touch on some of the fundamental principles involved. Since the cases always presuppose a doubt, consider momentarily the principles enunciated in Canon 1014: "Matrimonium gaudet favore iuris; quare in dubio standum est pro valore matrimonii, donec contrarium probetur, salvo praescripto Canonis 1127". Accordingly, if a doubt arises as to the validity of a marriage contracted, the validity of the marriage must be upheld until the invalidity of the same is proved. This principle is not merely a prescription of ecclesiastical legislation, but rather is an unvarying norm based on the Divine Law itself. The insolubility of the marriage bond—whether sacramental or legitimate—does not depend on the will of the Church. The Church does not recede from the principle of Canon 1014. Nor could She

sanction the contrary without grave danger of violating Divine Law.

Canon 1014 makes one exception. This exception is stated in Canon 1127: "In re dubia privilegium fidei gaudet favore iuris". This exception to the general norm of Canon 1014 is fundamentally of divine origin, otherwise it would certainly not be admitted by the Church. Canonists explain Canon 1127 to mean that in a doubtful matter, the Pauline Privilege enjoys the favor of the law; that in Pauline Privilege cases, the presumption is not in favor of upholding the marriage bond, but rather in favor of its dissolution. Now that Pope Pius XI and Pope Pius XII have consistently made use of their Supreme Pontifical Power to dissolve legitimate marriages in favor of the Faith — in cases where the Pauline Privilege strictly speaking does not apply—I believe authors will generally agree that the exception of Canon 1127 also applies in these cases.

For the disposition of many "*Aut-Aut*" cases, we shall propose as a solution a declaration of the "*status liber*" of the Plaintiff in favor of his Faith—these declarations emanating either from the Ordinary or the Holy See. Since authors are hesitant to discuss so-called "*status liber*" decisions — whereas we shall advocate them in our case studies — there must of necessity be some fundamental justification in Canon Law and in the "*praxis ecclesiae*" to vindicate such action.

Canon 1019 § 1 reads as follows: "Antequam matrimonium celebretur, constare debet nihil eius validae ac licitae celebrationi obsistere".

Canon 1069 § 2 contains the following prescription: "Quamvis prius matrimonium sit irritum aut solutum qualibet ex causa, non ideo licet aliud contrahere, antequam de prioris *nullitate aut solutione* legitime et certo constiterit".

The whole purpose of Canon 1069 § 2 is to legislate regarding those things to be ascertained before the Ordinary can be satisfied that there are no obstacles present that would prevent a valid and licit marriage of this individual. In other words

—it legislates concerning the norms to be observed before the *free status* of the person to contract a new marriage can be regarded as having been canonically established.

Sometimes it is found after investigation that the free status of a person previously married is established beyond all doubt, but that there remains an insoluble doubt as to whether the former marriage was actually invalid "*ab initio*" or whether the marriage is now dissoluble. In such cases there seems to be no violation of Canon 1069 § 2 should the ecclesiastical authority within the scope of its competency declare the individual's "status liber ad aliud matrimonium contrahendum in favorem fidei". In fact, there seems to be justification for such action both in the legislation and in the practice of the Church.

Authors are wont to translate the word "solutione" of Canon 1069 § 2 to mean "dissolution, dispensation". They speak of marriages being dissolved: (1) either by death of one of the parties; or (2) by the authority of the Church, when a ratified but non-consummated marriage is dissolved by Papal Dispensation or religious profession; (3) by application of the Pauline Privilege; (4) by Papal Dispensation in so-called "Helena Cases".

A decree of the Ordinary, allowing the application of the Pauline Privilege, is radically different from a Papal dissolution by dispensation. The latter actually dissolves a marriage at the moment the Holy Father concedes the "*gratia*". In Pauline Privilege cases, however, the marriage contracted in infidelity is not dissolved by the decree of the Ordinary. It is dissolved only at the moment the convert contracts a sacramental marriage. The decree of the Ordinary is nothing more than a declaration of the "status liber oratoris ad aliud matrimonium contrahendum in favorem fidei". Here then we have a typical example to show that the Church in her legislation endorses "*status liber*" decisions.

Now—observe the Church's legislation regarding the proper disposition to be made in certain cases involving Defect of

Canonical Form of marriage. The following *Dubia* were presented to the Pontifical Commission for the Authentic Interpretation of the Code: "Whether the Ordinary—without the formalities of law prescribed in the Constitution "*Dei miseratione*" of Pope Benedict XIV, November 3, 1741—can *declare a marriage null,* with the intervention of the Defensor Vinculi but without the need of a second judgment, in the following cases:

(1) If two Catholics—in a place which formerly was certainly subject to the "*Tametsi*", or after the Decree "*Ne temere*"—entered into a civil marriage only, without any ecclesiastical rite, and afterward obtained a divorce and now wish to contract a new marriage in the Church, or to validate before the Church a new marriage, contracted civilly; or

(2) If the Catholic party, disregarding the laws of the Church, contracted marriage with a non-Catholic party in a Protestant Church in a place which formerly was certainly subject to the "*Tametsi*", or after the Decree "*Ne temere*", and afterward obtains a divorce and wishes to contract a new marriage with a Catholic in the Church; or

(3) If the parties apostatized from the Catholic Faith, and while in the state of apostasy were married civilly or in a non-Catholic rite, later obtained a civil divorce, and now repentant wish to return to the Church and to contract a new marriage with a Catholic in the Church."

The Pontificial Commission—on October 16, 1919—replied to these propositions as follows: "The cases above mentioned require neither judicial process of any kind nor the intervention of the Defensor Vinculi, but *are to be settled* ("*resolvendi sunt*") by the Ordinary himself, or by the pastor after consulting the Ordinary, in the preliminary investigation prior to the celebration of the marriage mentioned in Canon 1019 and subsequent Canons." [1]

[1] *Acta Apostolicae Sedis*, XI (1919), 479. Translation from Doheny, *Canonical Procedure in Matrimonial Cases*, I (Milwaukee: Bruce, 1938), 679, 680.

The substance of this reply of the Ponfifical Commission is incorporated in Article 231 of the Instruction of August 15, 1936, issued through the Sacred Congregation of the Sacraments, in the discipline to be observed by the Diocesan Tribunals in adjudicating cases involving the nullity of marriage.

ARTICLE 231: "If anyone was certainly bound to the canonical form of the celebration of marriage and contracted marriage only civilly, or if he entered upon marriage in the presence of a non-Catholic minister, or if apostates from the Catholic Faith were married civilly in apostasy or in some alien rite, neither judicial solemnities nor the intervention of the Defensor Vinculi are required to ascertain the freedom of such parties to marry. Such cases *can be settled* ("solvendi sunt") by the Ordinary himself or by the pastor after consulting the Ordinary, in the investigation preceding marriage, as indicated in Canon 1019 and consequent Canons. However, if a doubt should remain about the conditions stated in paragraph 1 of the present Article, the question is to be decided according to the ordinary procedure of law".

Note that nowhere in the reply of the Pontifical Commission, or in Article 231 of the Instruction, is there any mention whatever of a *declaration of nullity* to be issued in the cases mentioned. Remember that the Pontifical Commission was asked specifically whether the Ordinary could *declare a marriage null,* etc. In response, the Pontifical Commission answered that such cases *are to be settled* by the Ordinary. Article 231 of the Instruction—even as the Pontifical Commission—carefully avoids mention of a declaration of nullity in the cited cases, but speaks of "*ascertaining the freedom*" of such parties to marry and repeats that such cases "*are to be settled*" by the Ordinary.

These specific Defect of Form cases are actually not declarations of nullity at all. They are decrees of the Ordinary, declaring the "free status" of the Plaintiff to enter another marriage, that is, the "free status" as far as this specific matrimonial venture is concerned. There is certainly no judicial Sentence of nullity in any sense of the term since there is no joinder of issue (*Contestatio Litis*)—no judicial process of any kind—in fact, the attempted marriage is not event considered to have a "*species matrimonii*".

There is yet another case in which the Ordinary, consistent with the prescriptions contained in Canon 1069 § 2, is directed to decree the "*status liber*" of a person previously married. If, after investigation, the Ordinary is satisfied that the presumptive death of a party is established, he declares the surviving party free to contract a new marriage—at least as far as this one previous matrimonial venture is concerned. This decree of the Ordinary is not a declaration of nullity of the marriage, nor does he dissolve the prior marriage because of this decree.

One final animadversion should precede a discussion of practical cases. When a Plaintiff presents a marriage case to the Tribunal, he is primarily interested in one thing: his right to contract a new marriage. As far as the Plaintiff is concerned, the validity or invalidity of his former marriage is a matter of interest only insofar as it might prove a possible barrier to a prospective future marriage. He is solely interested in having his "free status" declared. When he presents his case to a Tribunal, he always — at least in an implied manner—posits the following *Dubium*: "An Constet de Statu Libertatis ad Aliud Matrimonium Contrahendum?" As long as the spiritual and temporal rights of the Respondent and the sacramentality of the marriage are duly safeguarded, there seems to be no reason why the ecclesiastical authorities cannot proceed to answer that implied "*dubium*", avoiding any commitment as to the validity or invalidity of the marriage under consideration.

There is no one who has not been impressed from time to time with the policy of Holy Mother Church never to commit Herself on any matter unless it is absolutely necessary for Her to do so. If She can answer a *Dubium* by a simple "*Affirmative*" or "*Negative*" reply, She does so. In a formal trial, for example, there is always the formulated doubt: "An Constet de Nullitate Matrimonii in Causa?" The response of the Tribunal is simply: "Constat" or "Non Constat". A "Non Constat" decision is by no means a sentence that the marriage under consideration is actually a valid marriage; it only means that the marriage is not proved to have been invalid by reason of the grounds alleged.

If then the nullity of a particular marriage cannot be declared because of some insoluble doubt — whereas the free status of the party to contract a new marriage in favor of his Faith is certain—it would seem consistent with the policy of the Church to answer the implied *Dubium*: "An Constet de Statu Libertatis ad Aliud Matrimonium Contrahendum in Favorem Fidei?" without committing oneself in reference to the validity or invalidity of the marriage. As subsequent discussion will show, it seems unwise to resort to Canon 1127 for the purpose of creating a presumption one way or another about the validity or invalidity of the marriage. Canon 1127 should be applied to allow the ecclesiastical authority within the scope of its competency to declare the "free status" of the Plaintiff in favor of his Faith.

It is now in order to proceed to case studies. To facilitate matters, the various kinds of "*Aut-Aut*" cases have been divided into three specific classes. The examination of a few typical cases in each class will suffice.

CLASS I: Cases in which the nullity of a marriage is morally certain, but in which there remains an insoluble doubt as to the actual impediment causing invalidity of the marriage.

1. *Either* (*Aut*) Defect of Form *Or* (*Aut*) Pre-Code Disparity of Worship

SPECIES FACTI: Paul married Ruth (*acatholicam baptizatam*) in 1917 "*coram praecone*".

DUBIUM: Paul's baptism or non-baptism prior to 1917 remains an insoluble doubt.

PROVED: The investigation proves the following: Ruth was validly baptized a Protestant as a baby. Paul was never baptized in any religious denomination at any time in his life after attaining the use of reason. When he was ten years old, he was instructed in the Catholic Faith by Catholic friends, who also taught him how to receive the sacraments of Confession and Holy Communion. Since that time he has always professed to be a Catholic and has been receiving Holy Communion frequently. When he married Ruth, he tried his best to persuade her to consent to marriage in the presence of a Catholic priest, but she stubbornly refused to comply. The investigation failed to learn anything about the religious background of Paul in infancy except that his parents were supposed to have been Roman Catholics who had ceased practicing their religion a long time ago. (N. B. It is important that the investigation rule out a possible Oriental Catholic Rite affiliation of Paul's parents, since members of some Oriental Catholic Rites are not bound to the canonical form of marriage).

DILEMMA: If Paul was not baptized in infancy, then his marriage to Ruth is invalid "ratione impedimenti Disparitatis Cultus". If Paul was baptized as a baby (either as a Roman Catholic or heretically in some Protestant

denomination), then the marriage of Paul and Ruth is invalid "ratione Defectus Formae".

SOLUTION: The Ordinary declares the nullity of the marriage. The Sentence describes the Doubt and the Dilemma.

At this point it should be stressed that the proper disposition of any "*Aut-Aut*" case demands a scrupulous cognizance of many important factors. The investigation must always resolve itself into a true—not apparent—dilemma. To satisfy this condition, it will very often be necessary to take into consideration every possible diriment impediment or obex to matrimonial consent that might possibly destroy the dilemma.

Of vital importance too is the question of competency. Unless the ecclesiastical authority (whether it be a Tribunal of Judges, the Ordinary, or the Officialis) is competent by law to act in reference to the decisions involved in both horns of the dilemma, no decision can be rendered. That form of process must necessarily be followed throughout the entire investigation which will satisfy the Church's legislation for the decisions involved in both horns of the dilemma. It naturally follows that if one part of the dilemma involves an impediment that may be adjudicated only in a Formal Trial, then the entire investigation assumes the process of a Formal Trial even though the other part of the dilemma—considered by itself—would ordinarily fall under the provisions stipulated in Canon 1990.

Never to be overlooked is the fact that whenever any part of the dilemma is of such a nature that the intervention of the Defender of the Bond is required by law, that provision must always be observed and the right and/or obligation of the Defender of the Bond to appeal remains. In other words — the superior process, with all its specific and implied requirements, must always be observed. The solution of an "*Aut-Aut*" case is by no means a subterfuge of process demanded by ecclesiastical legislation.

2. *Either* (*Aut*) Defect of Form *Or* (*Aut*) Post-Code Disparity of Worship

SPECIES FACTI: Paul married Ruth (*acatholicam baptizatam*) in 1920 "*coram praecone*".

DUBIUM: Paul's baptism or non-baptism prior to 1920 remains an insoluble doubt.

PROVED: Paul's history is the same as in Case 1, noted immediately above. Ruth—although baptized a Roman Catholic in infancy—is a product of a mixed marriage. Her father was a Roman Catholic; her mother a Methodist. Ruth was reared "ab infantili aetate sine ulla religione" and consequently was not bound to the canonical form of marriage.

DILEMMA: If Paul was not baptized as a baby or at any time prior to his marriage to Ruth, then the marriage is invalid "ratione impedimenti Disparitatis Cultus". If Paul was baptized in infancy (either Catholic or heretically), then the marriage is invalid "ratione Defectus Formae".

SOLUTION: The Ordinary declares the nullity of the marriage. The Sentence describes the Doubt and the Dilemma.

3. Post-Code Multiple Ligamen Case.

SPECIES FACTI: Paul (acb)[2] married Ruth (acb) in 1930. Ruth was twice previously married. Ruth (acb) married her first consort in 1920. Ruth (acb) married her second consort (acb) in 1926.

DUBIUM: After investigation there remains an insoluble doubt as to the religion and free status of Ruth's first consort.

[2] Acb = baptized non-Catholic.

PROVED: Ruth was baptized a Protestant in infancy. She was married only twice prior to her marriage to Paul. Her first and second consorts were certainly alive when she married Paul. Ruth's second consort was a validly baptized Protestant when he married Ruth; he was never married before he married Ruth; he never became a convert to Catholicism. Except for the possible impediment created by Ruth's first marriage, the investigation rules out any diriment impediment or vicious intention in connection with the marriage of Ruth to her second consort.

DILEMMA: If the first marriage of Ruth was valid, then it created a diriment obstacle to her marriage with Paul. If the first marriage was invalid, then Ruth's second marriage was certainly a diriment obstacle preventing a valid marriage between Ruth and Paul.

SOLUTION: The Ordinary declares nullity of the marriage "ratione impedimenti Ligaminis". The Sentence describes the Doubt and the Dilemma.

4. Pre-Code Multiple Ligamen Case.

SPECIES FACTI: Paul (acb) married Ruth in 1920 "*coram praecone*". Ruth was twice previously married. Ruth married her first consort (acb — single) in 1910. Ruth married her second consort (*non-baptizatum* — single) in 1915.

DUBIUM: The evidence proves that Ruth was never baptized of her own accord in any religious denomination at anytime in her life after her seventh year of age. It is also proved that she was married only twice prior to her mar-

riage to Paul. It is certain that Ruth was never reared as a Catholic during her infancy and that she has never regarded herself as a Catholic at anytime in her life. (N. B. This last piece of evidence is important before the dilemma can be regarded as complete. Note that there is a difference of opinion as to whether or not a baptized Catholic — born of a mixed marriage and never reared Catholic — was bound to the canonical form of marriage if the marriage was contracted prior to the publication of the Code.) The investigation proves that Ruth's first and second consorts are still alive. Ruth's first consort was a validly baptized non-Catholic when he married Ruth. Save for a possible impediment of "Disparitatis Cultus", there is no obvious impediment or vicious intention indicated in connection with the marriage of Ruth and her first consort.

Ruth's second consort is proved never to have been baptized prior to his marriage to Ruth. He has never become a Catholic nor has his marriage to Ruth ever been dissolved by the Pauline Privilege or Pontifical Dispensation. With the exception of a possible diriment impediment "*Ligaminis*" created by the first marriage of Ruth, there is no obvious diriment impediment or vicious intention in connection with the marriage of Ruth and her second consort.

It is also proved that neither of the first two consorts of Ruth was married before he married Ruth.

DILEMMA: If Ruth was baptized heretically in infancy, then her marriage to Paul was invalid "ratione impedimenti Ligaminis" created by her first marriage. (If Ruth was baptized a Catholic in infancy, then she was either bound to the canonical form of marriage or not. If she was bound to the form of marriage, then her marriage to Paul was invalid because the canonical form of marriage was not observed. If she was not bound to the form of marriage, then her possible Catholic baptism in infancy creates no new difficulty.) If Ruth was not baptized in any religious denomination prior to her seventh year of age, then her marriage to Paul was invalid "ratione impedimenti Ligaminis" created by her second marriage.

SOLUTION: The Ordinary declares the marriage invalid without naming any specific impediment. The Sentence describes the Doubt and the Dilemma.

CLASS II. The second class of "Aut-Aut" case is the one in which after diligent investigation, the nullity of the marriage remains a matter of insoluble doubt, but when the "*status liber*" of the Plaintiff to contract a new marriage in favor of his Faith is certain beyond all doubt.

1. *Either* (*Aut*) Post-Code Impediment "Ligaminis" *Or* (*Aut*) Pauline Privilege Possibility.

SPECIES FACTI: Paul (*non-baptizatus*—single) married Ruth (nb)[3] in 1928. Ruth was previously married in 1920. Nothing can be ascertained about the religion or free status of Ruth's first husband.

[3] Nb = unbaptized.

DUBIUM: The validity or invalidity of Ruth's first marriage remains a matter of insoluble doubt.

PROVED: Ruth was never baptized. Interpellations were made of Ruth and were answered negatively. Paul was married only to Ruth. He was never baptized prior to his Catholic baptism in 1945. Ruth's first husband is still alive but refuses to cooperate in the investigation.

DILEMMA: If the marriage of Ruth and her first husband was valid, then the marriage of Paul and Ruth is invalid "ratione impedimenti Ligaminis". If the marriage of Ruth and her first husband was invalid, then the Pauline Privilege is applicable now in the case of Paul.

SOLUTION: Ordinary applies Canon 1127 and decrees the "Status Liber Oratoris ad Aliud Matrimonium Contrahendum in Favorem Fidei". The Decree describes the Doubt and the Dilemma.

At this point, reference may be appropriately made to Kearney's work, *The Principle of Canon 1127*, an exhaustive treatise on Canon 1014 and Canon 1127.[4] In his explanation of these Canons, Kearney has this to say: "The general principle of Canon 1014, that in doubt, the validity of marriage is upheld until nullity is fully proved, is subject to one exception expressed in the Canon itself—for the legislator safeguarded the principle of Canon 1127—in doubtful matters the privilege of faith enjoys the favor of law. Canon 1014 does not comprehend those cases wherein there is question of conversion to the Catholic Faith and the reception of baptism. In Canon 1127 then, the term 'favor of the law', objectively

[4] N. 163, The Catholic University of America, Canon Law Studies (Washington, D. C.: The Catholic University of America Press, 1942.)

considered, is to be understood as the disposition of the law to admit the use of the privilege of faith in a doubtful matter concerning marriage. The presumption in favor of the validity of the marriage, which is to be upheld in face of a doubt of law or a fact concerning its validity, yields to the presumption in favor of the faith, or to the liberty of a convert free from infidelity".

One of the conditions required for the application of the Pauline Privilege is a *valid* marriage contracted between two infidels. If the validity of the marriage is a matter of insoluble doubt, then we certainly can have recourse to Canon 1127. The presumption would no longer be in favor of upholding the marriage bond, but would favor its dissolution. Does this mean that Canon 1127 gives us the right in such cases to presume that the marriage contracted in infidelity was a valid marriage, or to presume that the marriage was invalid? Does it mean that we can use whatever presumption would be more helpful to the *neo-conversus* "*hic et nunc*"? *Transeat.* In the cases we are considering, I do not believe there is any necessity of resorting to any presumption as to the possible validity or invalidity of the marriage contracted in infidelity. The Ordinary simply applies Canon 1127 and decrees the "Status Liber Actoris In Favorem Fidei". My reason for suggesting this solution is practical rather than theoretical. Should the Ordinary apply Canon 1127 and simply decree "Privilegium Paulinum Applicet", he would be creating a false presumption "*in foro externo*" that might eventually result in a grave miscarriage of justice. An example will illustrate this assertion: Paul (nb) married Ruth (nb) in 1935. There is an insoluble doubt as to the validity of this marriage. Paul became a Catholic in 1941. The Ordinary, applying Canon 1127, allowed him to apply the Pauline Privilege. He married a Catholic in 1941. In 1942, Ruth became a Catholic. After Ruth's separation from Paul, but before Paul's Catholic marriage, Ruth had married and divorced a baptized non-Catholic. Ruth writes to the

Ordinary of Paul for a copy of the Pauline Privilege decree that was issued to Paul in 1941. She also obtains a record of the Catholic marriage of Paul, contracted in 1941. Fortified with these documents, Ruth approaches her own Ordinary and asks that she be given permission to marry, on the grounds that her second marriage was invalid "ratione impedimenti Ligaminis", and that her first marriage was dissolved by Paul's subsequent Catholic marriage. Ruth's Ordinary declares her second marriage invalid "ratione impedimenti Ligaminis" acting on the assumption that—since Paul's Ordinary allowed the Pauline Privilege—he must have been satisfied that all the conditions were fulfilled, that is: a *valid* marriage between two infidels, etc. At first sight, we might say that Ruth's Ordinary acted correctly and yet he erred grievously and was led into error because Paul's Ordinary created a false presumption "*in foro externo*" when there was no necessity for doing so. The marriage of Paul and Ruth was doubtfully valid and remains so forever. If the marriage of Paul and Ruth was indeed an invalid marriage, then Ruth's second marriage is presumed to have been validly contracted. Since Ruth's second consort was a baptized person, the only way Ruth could now be permitted to contract a new marriage would be: if the Holy See granted her a "Documentum Libertatis Papale in Favorem Fidei"—this decree embodying a Pontifical Dispensation ("*Ad Cautelam*") *In Favorem Fidei.*

Had Paul's Ordinary, in the first place, issued a decree declaring Paul's "Status Liber in Favorem Fidei", he would not have committed himself one way or another "*in foro externo*" as to the validity or invalidity of the marriage of Paul and Ruth. A subsequent Ordinary, or Tribunal, would immediately be aware—upon reading the decree—that the first Ordinary merely decided Paul's freedom to marry and that Ruth's freedom to marry at this time was still a matter to be investigated thoroughly. If all Tribunals were to follow the policy of issuing "*status liber*" decisions in doubtful

Pauline Privilege cases, it would help subsequent Tribunals to operate more efficiently and expeditiously. They could also operate on the presumption that once the Pauline Privilege was made applicable in a case, there is a legitimate presumption "*in foro externo*" that that marriage was indeed a valid one, or at least that there was no positive indication of invalidity of the marriage. Tribunals would have assurance that the subsequent marriage of Paul to a Catholic indeed dissolved the bond of marriage contracted in infidelity.

2. *Either* (*Aut*) Pre-Code Impediment "*Ligaminis*" *Or* (*Aut*) Pauline Privilege Possibility.

SPECIES FACTI: Paul (nb — single) married Ruth (nb) in 1920. Ruth was previously married in 1917. Her first husband is alive.

DUBIUM: There remains an insoluble doubt as to the baptism or non-baptism of Ruth's first husband prior to 1917.

PROVED: The marriage of Ruth and her first husband is apparently valid except for the possible impediment of Pre-Code Disparity of Worship. Ruth's first husband has never become a Catholic nor was his marriage dissolved by application of the Pauline Privilege or Papal Dispensation. Ruth is proved never to have been baptized. Paul's only marriage was with Ruth. Paul was never baptized prior to his Catholic baptism in 1945. Interpellations answered negatively.

DILEMMA: If Ruth's first husband was not baptized prior to 1917, then the marriage of Paul and Ruth was invalid "ratione impedimenti Ligaminis". If Ruth's first husband was baptized at the time he married Ruth, then the Pauline Privilege is now applicable in the case of Paul.

SOLUTION: Ordinary applies Canon 1127 and decrees the "Status Liber Oratoris in Favorem Fidei". The Decree describes the Doubt and the Dilemma.

Before the next case is discussed it should be emphasized that Canon 1127 cannot be applied when there is a doubt concerning the baptism of one or both parties to the marriage. On June 10, 1937, the Sacred Congregation of the Holy Office issued a decree, in reply to two *Dubia* presented. The first question was: "Whether, in a case of an insoluble doubt about baptism, in a marriage contracted by two doubtfully baptized non-Catholics, the use of the Pauline Privilege—in virtue of Canon 1127 of the Code—can be permitted to either party converted to the Faith?" Reply: "In the NEGATIVE". The second query was: "Whether, in case of an insoluble doubt about baptism, in a marriage contracted between an unbaptized and a doubtfully baptized non-Catholic, Ordinaries can permit the use of the Pauline Privilege—in virtue of Canon 1127—to either party converted to the Catholic Faith?" Reply: "RECOURSE MUST BE HAD TO THE HOLY OFFICE IN INDIVIDUAL CASES".[5]

3. *Either* (*Aut*) Pre-Code Disparity of Worship *Or* (*Aut*) Pauline Privilege Possibility.

SPECIES FACTI: Paul (nb) married Ruth in 1917 in the presence of a non-Catholic minister.

DUBIUM: Baptism or non-baptism of Ruth prior to 1917 remains a matter of insoluble doubt.

PROVED: This is the only marriage for both Paul and Ruth. Non-baptism of Paul, prior to Catholic baptism in 1945, is established. Ruth proved never to have been baptized since marriage in 1917. Interpellations answered negatively.

[5] *AAS*, XXIII (1937), 305-306. Translation from Doheny, *Canonical Procedure in Matrimonial Cases*, II (Milwaukee: Bruce, 1944), 571, 572.

DILEMMA: If Ruth was baptized prior to 1917, then the marriage of Paul and Ruth is invalid "ratione impedimenti Disparitatis Cultus". If Ruth was not baptized prior to 1917, then the Pauline Privilege is now applicable in the case of Paul.

SOLUTION: Ordinary applies Canon 1127 and decrees "Status Liber Oratoris ad Aliud Matrimonium Contrahendum in Favorem Fidei". The Decree describes the Doubt and the Dilemma.

Is this solution a violation of the "*Restrictus*" of the Holy Office? In issuing its restriction, the Holy Office, in 1937, declared that the Pauline Privilege was not applicable—in virtue of Canon 1127—when there is question concerning the baptism or non-baptism of one or both of the parties. The Holy Office stated that Canon 1127 was certainly not applicable when there is an insoluble doubt about the validity of the baptism in a case of two doubtfully baptized non-Catholics; and that recourse was to be had to the Holy Office in individual cases, when one of the parties is doubtfully baptized.

In the case just discussed, there certainly remains the possibility that Ruth may have been a baptized person at the time of the contraction of the marriage. In other words, we have an insoluble doubt "re facti baptismi". The solution reached here, however, is no violation of the restriction of the Holy Office, since the Ordinary is not declaring that the Pauline Privilege is applicable but is applying Canon 1127 to decree the party's free state in favor of his Faith. The dilemma which confronts the Ordinary actually resolves itself to this: a marriage contracted prior to the publication of the Code between a validly baptized non-Catholic and a non-baptized person, is certainly invalid. A marriage between two non-baptized persons (all other conditions being fulfilled) is certainly susceptible of dispensation by virtue of

the Pauline Privilege. The Ordinary has competency to act in the alternative cases. He is no longer concerned about the insoluble doubt of the baptism or non-baptism of Ruth. The Ordinary is merely doubtful about the validity of the marriage in question. He does not appeal to Canon 1127, to presume *a possible baptism or non-baptism* of Ruth. He solves the doubt about the *validity* of the marriage, by applying Canon 1127 and does so without violation of the restrictions of the Holy Office of June 10, 1937.

4. *Either* (*Aut*) Post-Code Defect of Form *Or* (*Aut*) Pauline Privilege Possibility.

SPECIES FACTI: Paul married Ruth (nb) in 1920 "*coram praecone*".

DUBIUM: Possible baptism or non-baptism of Paul in infancy remains a matter of insoluble doubt.

PROVED: This was the first marriage for both parties. Ruth has never been baptized. Paul was certainly never baptized of his own accord after his seventh year of age and prior to his "conditional" Catholic baptism in 1945. Paul is the product of a mixed marriage. His father was a Roman Catholic; his mother an Episcopalian. He attended Catholic instructions during early childhood, and made his First Holy Communion. He has always regarded himself as a Catholic. He lived with Catholic grandparents from the age of two years to the age of four. The grandparents never approved of the marriage of Paul's parents "*extra ecclesiam*". There is solid reason for believing that Paul might have been baptized a Catholic in infancy without the knowledge of his parents. The marriage of Paul and Ruth was never validated by a priest.

DILEMMA: If Paul was baptized a Catholic while in the custody of his grandparents, then the marriage of Paul and Ruth was invalid "ratione Defectus Formae". If Paul was not baptized in infancy (either Catholic or heretically), then the Pauline Privilege is now applicable in the case of Paul.

SOLUTION: Ordinary applies Canon 1127 and decrees "Status Liber Oratoris in Favorem Fidei". Decree describes the Doubt and the Dilemma.

5. *Either* (*Aut*) Post-Code Disparity of Worship *Or* (*Aut*) Pauline Privilege Possibility.

SPECIES FACTI: The same situation as in Case 4, immediately above, except: Paul never had any church affiliation in childhood; never regarded himself as a Catholic. The testimony of his parents and others prove that he was never baptized non-Catholic at any time in his life. There is some reason to believe that the grandparents had Paul baptized Catholic—without the knowledge of Paul's parents—while Paul was in their custody (and in danger of death). The grandparents are deceased and there is no way of establishing that Paul was or was not baptized a Catholic in infancy.

DUBIUM: Possible Catholic baptism of Paul in infancy remains a matter of insoluble doubt.

DILEMMA: If Paul was baptized a Catholic while in the custody of his grandparents, then the marriage is invalid "ratione impedimenti Disparitatis Cultus". If Paul was simply never baptized, then the Pauline Privilege is applicable now in the case of Paul.

SOLUTION: Ordinary applies Canon 1127 and decrees "Status Liber Oratoris In Favorem Fidei". The Decree describes the Doubt and the Dilemma.

6. *Either* (*Aut*) Impediment of Consanguinity *Or* (*Aut*) Pauline Privilege Possibility.

SPECIES FACTI: Paul (nb) married Ruth in 1920 "*coram praecone*". Paul alleges that he and Ruth were blood relatives in the third degree of the collateral line (i.e., second cousins).

DUBIUM: The alleged Protestant baptism of Ruth in infancy remains a matter of insoluble doubt (alleged impediment does not affect the unbaptized).

PROVEN: That Paul and Ruth are blood relatives in the third degree of the collateral line is established by documentary evidence and by the depositions of qualified witnesses. Ruth has not been baptized since the marriage. There was no impediment of civil law preventing marriage of second cousins. Paul was never baptized prior to his Catholic baptism in 1945. Interpellations were answered negatively.

DILEMMA: If Ruth was baptized heretically prior to 1920, then the marriage was invalid "ratione impedimenti Consanguinitatis Gradu Tertio Lineae Collateralis". If Ruth was simply never baptized at any time in her life, then the Pauline Privilege is now applicable in the case of Paul.

SOLUTION: Ordinary applies Canon 1127 and decrees "Status Liber Oratoris in Favorem Fidei". The Decree describes the Doubt and the Dilemma.

CLASS III: The third type of "*Aut-Aut*" case involves a marriage in which the validity or invalidity remains a matter of insoluble doubt, but in which —otherwise—a Papal dissolution of the marriage is possible and indicated.

1. *Either* (*Aut*) the Marriage is Invalid "Ratione Defectus Consensus Contra Bonum Sacramenti" *Or* (*Aut*) the Marriage is Dissoluble by the Supreme Apostolic Authority "Ratione Inconsummationis Matrimonii".

SPECIES FACTI: Paul (acb) married Ruth (acb). Paul claims he married Ruth solely for the purpose of giving a name to the child to be born to Ruth. He maintains that the marriage was never consummated because of a mutual agreement upon divorce to be sued for as soon as practicable. The Holy Office was asked to allow Paul to act as *Actor* (Plaintiff) in connection with a formal trial. Permission was granted.

DUBIUM: "Intentio contra bonum sacramenti" remains a matter of doubt by reason of lack of canonical evidence.

PROVED: Ruth denies allegation of divorce pact. She admits the non-consummation of the marriage but refuses to testify in connection with the formal case. Other evidence is insufficient to allow the Judges to declare the nullity of the marriage. The combined evidence, however, proves non-consummation (especially "Argumentum Coarctatum"). The decision of the Court of First Instance is "*Negative*"—with the recommendation that the Holy See be asked to dispense from the bond of the marriage on the grounds of non-consummation. Paul's second marriage

was contracted with a Catholic "*extra ecclesiam*".

DILEMMA: If the allegation of Paul is true, then the marriage is in reality invalid by reason of a vicious intention "*contra substantiam*" even if this can never be established "*in foro externo*". If, however, the marriage was actually valid, then a Papal Dispensation from the bond of a sacramental but non-consummated marriage is a possibility.

SOLUTION: The case should be sent to the Holy Office. The Holy Father should be asked to grant a "Documentum Libertatis Papale" permitting Paul to validate his attempted marriage with a Catholic.

A "Documentum Libertatis", rather than a Papal Dispensation, should be sought for the same reason as previously explained in connection with Pauline Privilege cases involving an insoluble doubt about the validity of the marriage contracted in infidelity. A Papal Dispensation "Super Matrimonio Rato Sed Non Consummato" would lend a presumption "*in foro externo*" that the marriage was reasonably adjudged to have been valid, since it is hardly to be expected that the Holy Father would dispense from the bond of or dissolve a marriage which, in reality, never existed, or only doubtfully existed. Nor could the Holy Father in this case appeal to Canon 1127—that is, to the principle that the "privilegium fidei" enjoys the favor of the law in doubtful cases—for in this instance we have a doubtful marriage contracted by two baptized persons.

A similar case was presented to the Holy Father by the Cleveland Tribunal some years ago. The Plaintiff (acb) clearly stated in his petition that he married the Respondent (acb) under duress; that he and the Respondent had mutually agreed, before the marriage, never to live together

after the marriage. The Plaintiff claimed that the reason for the marriage was to give the child to be born a name. The Plaintiff first petitioned the Cleveland Tribunal to declare his marriage with the Respondent null and void on the grounds that he was unduly influenced to marry the Respondent, and on the grounds that neither he nor the Respondent gave true matrimonial consent. A Tribunal of Judges, duly elected, rejected the petition on the grounds that the Plaintiff—as a non-Catholic—had no right to act as Plaintiff without first obtaining permission from the Holy Office. The Judges further advised that the petition—with proper amendment—be sent to Rome and permission be requested of the Holy See to institute the procedure to establish non-consummation, as a preparatory step for a Papal dissolution of the marriage. The Holy Office granted permission to make an investigation "Super Matrimonio Rato et Non Consummato".

The evidence in the case proved not only that the marriage was never consummated, but definitely proved that the marriage was invalid "ratione Defectus Consensus Contra Substantiam". The Defensor Vinculi argued in his *Animadversiones* as follows: "A dispensation 'super matrimonio rato et non consummato' naturally envisions a *valid* marriage That the marriage in question was invalid 'proper defectus consensus ex parte oratoris et specifice contra bonum fidei et sacramenti' is quite evident. The Plaintiff states rather emphatically in his petition: 'I consented to marry her but stated openly that I would never live with her'. The witnesses also confirmed the invalidity of the marriage. Since the Plaintiff was the cause of the invalidity of the marriage with the Respondent he by that fact deprives himself of the right to stand in judgment in formal trial (Canon 1971)". In other words, the Defensor Vinculi questioned the justification of dissolving a marriage by Papal Dispensation since the marriage is proven not to have been a valid contract at all; consequently, no marriage.

In view of the situation, one might have expected the Holy Office to demand that the case be heard in formal trial, giving the Plaintiff permission to act as *Actor*. Remember that here there was a question of a Dilemma and a *soluble* Doubt. Instead, the Holy Office returned the following Rescript:

AD DUBIUM: "An consilium praestandum sit SS.mo pro dispensatione matrimonii (N.N) re juxta certas statutas regulas mature discussa, respondendum censuerunt:

"Facto verbo cum SS.mo detur oratori *documentum libertatis*. Et ad mentem: R.P.D. Ordinarius, antequam virum ad novum matrimonium admittat, conetur eundem ad veram fidem prudenter adducere".

Here then we have a typical example of a "*status liber*" decision, granted by the Holy Father through the Holy Office. Moreover, the Holy Office was not confronted by an insoluble doubt since the invalidity of the marriage—with the evidence already on hand—would very likely have been sufficient to allow the Judges in formal trial to decide for the nullity of the marriage "ratione Defectus Consensus". The dilemma was complete even though the doubt was soluble. A "Documentum Libertatis" was granted.

2. *Either* (*Aut*) the Marriage was Invalid by Reason of a Diriment Impediment (in this case Consanguinity) *Or* (*Aut*) the Marriage is Dispensable "Ratione Dispensationis Pontificiae in Favorem Fidei Oratoris".

SPECIES FACTI: Paul (nb) married Ruth (acb) in 1920 "*coram praecone*". Paul alleges invalidity of the marriage by reason of the diriment impediment of Consanguinity in the second degree of the collateral line (i. e., that they were first cousins).

DUBIUM: The alleged relationship cannot be proved because of the *lack* of documentary evidence

and qualified witnesses. The relationship remains a matter of insoluble doubt.

PROVED: The heretical baptism of Ruth in infancy is proved. That Paul was not baptized prior to his Catholic baptism in 1945 is also established. This was Paul's only marriage. There is no hope of reconciliation. Paul's conversion is sincere. There has been no cohabitation for a long time. In fact, Paul and Ruth have not seen each other since 1930.

DILEMMA: Either the marriage is invalid by reason of Consanguinity, as alleged in the petition, or the marriage is now susceptible of dispensation by the Supreme Pontifical Power in favor of Paul's Faith.

SOLUTION: The case should be sent to the Holy Office. The Holy Father should be asked to grant a "Documentum Libertatis Papale In Favorem Fidei Oratoris Ad Aliud Matrimonium Contrahendum".

Here again—and for the same reasons mentioned before—the writer maintains that a "*status liber*" should be sought rather than a Pontifical Dispensation. In support of this contention, consider an actual case which was instituted by the Cleveland Tribunal and decided by our Holy Father. It is a case similar to Case 2 just presented since it involves a dilemma where the marriage was either invalid "*ab initio*" because of a diriment impediment—or—there was a possibility of dissolving the marriage by Papal Dispensation in favor of the Plaintiff's Faith.

The Plaintiff married the Respondent in 1916 before a minister. They lived together two years and were divorced. Nothing at all could be established about the baptism or lack of baptism of the Respondent and she has long since disappeared.

The Plaintiff's father died when the Plaintiff was a baby. The Plaintiff's father became a Catholic on his deathbed through the instrumentality of Catholics at the hospital. His dying request of his non-Catholic wife was that the Plaintiff be reared a Catholic. His wife promised to fulfill this request, although she never became a Catholic herself. When the Plaintiff was six years old, his mother was compelled to break up the home and to go out to seek work for a living. She placed the Plaintiff with a Catholic lady and at the same time arranged for the Plaintiff to attend a Catholic school nearby. While at school, the Plaintiff attended the Catholic catechism instructions with the other children. He made his First Holy Communion and was confirmed. He was a Mass-server. The Plaintiff was always under the impression that he was a Catholic. He presumed that he must have been baptized a Catholic although he had no memory of a baptism himself—nor was he ever told directly by his mother or anyone else that he had been baptized. The Plaintiff's mother died many years ago. The Plaintiff sought everywhere imaginable for a record of his baptism but his search was in vain.

The case presented the following dilemma: if the Plaintiff was baptized as a baby—either Catholic or heretically—then the marriage was invalid by reason of defect of canonical form. If the Plaintiff was never baptized and the Respondent was baptized at the time of the marriage, then the marriage was invalid by reason of the impediment of Pre-Code Disparity of Worship. If the Plaintiff was never baptized and the Respondent was never baptized in any religion since her separation from the Plaintiff up to the present time, then the Pauline Privilege would be applicable after conditional Catholic baptism of the Plaintiff and after Interpellations had been properly made. Since the Respondent could not be found and the Plaintiff's baptism in infancy remained an insoluble doubt, there remained the one possibility (the other horn of the dilemma)—a Papal dissolution of the marriage "In Favorem Fidei". The Rescript from the Holy Office read as follows:

"In Curia Episcopali Clevelandensi confectus est processus in causa matrimonii quod N.N. (educatus in religione catholica, sed de cuius baptismo non constat), anno 1916 contraxerat, coram ministello cum acatholica N.N.

Actis in hac Suprema S. Congregatione examini subiectis, expletisque omnibus in casu explendis, quaestio proposita est Fer. IV die 13 iunii 1945 in Conventu Plenario E.mõrum Patrum, qui ad dubium:

'An consilium praestandum sit SS.mo pro concedendo oratori N.N. documento libertatis, ut praevio baptismo sub conditione conferendo, coram Ecclesia convalidare valeat suam unionem actu civili peractam cum muliere catholica quacum convivit', re iuxta certas statutas regulas mature discussa, respondendum: 'Affirmative'.

SS.mo D.N.D. PIUS, Divina Providentia Papa XII, in Audientia Exc.mo ac Rev.mo Dno Assessori S. Officii impertita, Feria V, die 14 iunii, 1945 de omnibus habita relatione, benigne adnuere dignatus est pro gratia iuxta supra relatum Decretum. In praesenti gratiae concessione includitur quoque, quatenus opus sit, dispensatio ab impedimento criminis, de quo in Can. 1075 § 1."

Sac. Joannes Pepe, *Notarius*

Here again we have an example in which the Holy Father granted a "*status liber*" decision rather than a Papal Dispensation of the marriage "In Favorem Fidei". The latter is certainly included "*ad cautelam*" but there is no commitment on the part of the Holy See, one way or another, as to the validity or invalidity of the marriage in question. Even the dispensation from the impediment of crime was given "ad cautelam—quatenus opus sit".

Corollary

The "*praxis ecclesiae*" in the administration of justice has always been motivated by the axiom: "*salus animarum, lex prima*". In other words, the Church is always inclined to favor giving a Plaintiff in a case relief in the most efficient and expeditious manner possible, as long as the rights of all

parties concerned are conscientiously respected and protected. We have much ecclesiastical legislation in support of this attitude of the Church.

Informal procedure has been allowed in connection with the investigation to be made in so-called "excepted cases", specifically mentioned in Canon 1990. It has been pointed out that Article 231 of the Instruction of 1936 has permitted the Ordinary to continue settling certain Defect of Form cases without any judicial procedure whatsoever. There may be noted further the so-called regulations concerning the "*fatalia legis*" expressed in Canons 1881, 1883 and 1886. These Canons legislate regarding the time limit on appeals which is designated primarily to avoid unnecessary and undue delay in settling cases. Canons 1709 §§ 1 and 1710, as well as Articles 61 and 67 of the Instruction of 1936, determine, for the same purpose, the time limit Tribunals are to observe in accepting or rejecting a libellus. Canon 1625 legislates about the canonical penalties to which an individual becomes liable who impedes or delays justice. There is no doubt that the Church demands efficient and prompt action, and in doing so, has the welfare of souls at heart.

As a corollary flowing from what has been discussed thus far, one naturally seeks the answer to the question: what is the "*modus agendi*" to be followed in initiating an investigation in Roman cases involving a dilemma and a soluble doubt? The question may be restricted for the present purpose to *sacramental* marriages that, in their final disposition, are adjudicated by the Holy See. Consider, for the sake of clarification, a hypothetical case.

Paul and Ruth, non-Catholics, are married by their minister. Paul now alleges that the marriage was never consummated, that he had no intention of making the marriage a permanent union and that he married Ruth because of pressure brought to bear upon him by Ruth's parents. The non-consummation of the marriage could very easily be established because of the fact that Paul and Ruth were never

alone together after the marriage and there are a host of available witnesses who could be cited to confirm this fact. On the other hand, there is definite indication in Paul's petition that the marriage could probably be declared null and void on the grounds of a vicious intention "*contra substantiam*". Since it is evidently much easier—in this instance—to establish non-consummation than it would be to prove the alleged vicious intention, would it be permissible to petition the Holy Office "*ab initio*" to allow an investigation to establish the alleged non-consummation of the marriage, anticipating a "*status liber*" decision for Paul by the Holy Father? Or is it an inexorable requirement to petition the Holy Father to allow Paul to act as *Actor* (Plaintiff) in a formal trial to determine whether the marriage was null and void on the grounds of simulation? In an actual case, previously discussed, it has been shown that the Holy Office issued a "*status liber*" decision because non-consummation was proven—even though the nullity of the marriage was evident from the acts of the case. That decision was rendered "*post factum*" — that is, after the investigation was completed. Nevertheless, it does betray an attitude of the Holy Office. If the nullity of a marriage must always be investigated first, before we begin to think about a Papal dissolution "*ad cautelam*" on the grounds of non-consummation, then the Holy Office could not have acted as it did but should have insisted on a formal trial first. I say this because the Holy Office could not resort to Canon 1127 and the Privilege of Faith when it granted the "*status liber*" decision. We remember that the marriage in question was contracted between two baptized Protestants.

It should be concluded from the foregoing that the easier way to bring relief to the Plaintiff seems to be consistent with the legislation and the practice of the Church, and should the "*status liber*" be indicated as the easier process, without prejudice to the rights of all parties concerned,—that avenue of approach seems to be the proper "*modus agendi*". The

true reason for insisting on formal process, when the nullity of a marriage is indicated, is to protect the spiritual and material rights of the Respondent in a case and to safeguard the sacramental bond of marriage. For this reason, the Church demands the election of Advocates and Procurators for both parties and the intervention of the Defensor Vinculi, whose duty it is to safeguard the sacrament. When the Respondent has very evidently forfeited his right to demand reconciliation, or when the Respondent simply refuses reconciliation, or when he does not care one way or another as to the outcome of a case brought to the attention of the Diocesan Tribunal by the Plaintiff, and—since the Defensor Vinculi in any case is present to protect the sacramental bond of marriage—that process which would bring relief to the Plaintiff more quickly seems to be consistent with the "*mens ecclesiae*", which is primarily interested in the salvation of souls. Under such circumstances, the fairest thing to do — when the "*status liber*" of the Plaintiff could be more easily and quickly established—is to proceed immediately to the doubt: "An Constat de Statu Libertatis ad Aliud Matrimonium Contrahendum". Since the Plaintiff is interested only in his freedom, and the Respondent is not interested in the validity or invalidity of the marriage, why should the Church commit Herself on the validity or invalidity of the marriage since no one is asking Her to do so? I might add that there is always a sufficient grave reason present to allow the Holy Father to use his Pontifical Powers of dispensation "*ad cautelam*". At any rate, this fact is always brought out in any investigation.

In conclusion, let me state that in all the propositions considered, the writer has been motivated by only one thing: the "*salus animarum*"; to bring relief to sincere souls as quickly as possible, consistent with the law of God and of the Church. Members of Matrimonial Courts will be the first to admit that theirs are not enviable positions, and yet most important positions of trust, since their answers are—in most instances — so very final. The Holy Father, in his recent

allocution to the Sacred Roman Rota (October 2, 1944)—speaking on matrimonial process in its ordination and subordination to the universal end of the Church, namely: the salvation of souls—had this to say: "The jurist, who, as such, is concerned solely with law and inflexible justice is wont to appear almost instinctively alien to the ideas and intents of the care of souls, and leans toward a definite cleavage between the two 'fora': the forum of conscience and the forum of the external juridical social living together. This tendency towards a definite separation of the two fields is legitimate up to a certain point, insofar as the pastoral charge is not properly and directly inherent in the office of the Judge and his collaborators in the judicial process. It would be a tragic error, however, to affirm that they are not, in the last and definite instance, in the service of souls, for this would place them in ecclesiastical judgment outside of the divinely instituted scope and unity of action of the Church. They would be as corporate members who no longer form a part of the whole and who no longer wish to submit and regulate their activity according to the purpose of the complete organic body". The Holy Father continues: "The care of souls guarantees a counterbalance, maintaining alert in the conscience the maxim: 'Leges propter homines, et non homines propter leges'".

FRAUD AND THE ESTOPPEL OF CANON 1971 § 1-1°

IT is unnecessary to prove that the interpretation of the restrictive clause of canon 1971, *nisi ipsi fuerint impedimenti causa*, is fraught with great difficulty. One has only to recall the fact that the Pontifical Commission for Interpreting the Canons of the Code has found it necessary to issue, on five different occasions, an official clarification of the meaning of these few words. We know also that various canonists have struggled with the problem, endeavoring in their turn to clarify the matter and to apply to practical situations the seemingly very simple edict of the law. In view of these uncontestable facts it may appear somewhat futile to present to the readers of THE JURIST another study of the problem, since the hope of arriving at a definite, clear-cut solution is bound to seem groundless. Yet a review of the question can be of some profit, if only for the reason of offering a fresh view of the problem. But, beyond that even, it is possible to present for consideration the principle that seems to underlie the law and in the light of that principle to analyze the official decisions issued up to now.

We are directed by the legislator himself to keep the purpose of a law before us whenever a study of the wording fails to remove all doubt as to its meaning (canon 18). If one sees clearly what the legislator was striving to attain, he then is in a better position to understand the legislative enactment intended for that end. This is certainly true of canon 1971. Until the exact reason why its restrictive clause has been imposed becomes clear to us, we cannot expect to deduce, by private interpretation at least, the true meaning and scope of the law. The writer's opinion is *that the purpose of the restrictive clause is to reinforce the obligation, incumbent upon the parties, of not contracting marriage unless they are free*

to do so. At the outset this viewpoint will be proposed merely as a hypothesis, capable of explaining best the specific directives of the Code Commission, and for that reason acceptable. Following this, legal arguments in support of this hypothesis will be offered, above all the strong support to be found in the norms and authoritative interpretation of the pre-Code law. It is hoped that the readers of THE JURIST will reserve judgment on the hypothesis proposed and the deduction drawn therefrom until they have weighed the arguments in its favor.*

I

As the writer sees it, the key to the solution of the meaning of the restrictive clause of canon 1971 and the various decisions issued to explain it further is the norm laid down in canon 1019 and then supplemented in canon 1020. Before a marriage is celebrated, there must be moral certainty that no legal obstacle to its validity or licitness exists. All concerned with the making of the marriage contract should see to it that this law is not violated, viz., the parties to the contract and the pastor who assists at the marriage as the official witness of the Church (canons 1020 § 1, 1031 § 3, 1097 § 1-1°). As a matter of fact, even the general faithful have a grave duty in the matter, to bring to light what might escape either the parties or the assisting priest (canon 1027). Legal responsibility for any invalidity is thereby fixed.

And it is fixed *principally* upon the parties. At first sight it might seem that the obligation of moral certitude as to their

* Here is a summary of the divergent views expressed so far as to the meaning of the phrase *impedimenti causa*:

1. *as to the act of causing the impediment*, some are of the opinion that the impediment as a fact must be brought into existence by the one estopped, others that even the awareness that an impediment does exist will suffice;

2. *as to the object of this act*, some hold that the estoppel can apply only in the case of impediments whose existence depends on the parties, others that it applies in the case of any impediment;

3. *as to intention*, some require that a party make the contract with the intention of entering an invalid marriage, others that he marry with the awareness of acting illegally (at least presumably so).

freedom rests, at least legally, upon the priest assisting at the marriage. Yet even a moment's reflection will convince one that the obligation of the priest can be fulfilled only if the parties give their active cooperation. Certainly this is evident from canon 1020 § 2. The pastor must formally interrogate the parties as to their free state, and they evidently are obliged to tell the truth in so far as they know it. They have this obligation because they not only receive the sacrament of marriage, but also administer it to one another. It is as ministers of the sacrament, that they have a very clear responsibility for its valid and lawful administration. Deliberate failure on their part to reveal to the priest a legal obstacle of which they are aware will, as a rule, make it impossible for the priest to fulfill his duty of preventing the marriage. Basically, therefore, the parties are responsible for any nullity that might ensure.

Confirmation for this can be found in the instruction *Sacrosanctum matrimonii*, issued by the Sacred Congregation of the Sacraments on June 29, 1941. The duty of the contracting parties is set forth *first*:

> "Neminem latet gravem in sacramentum iniuriam committere, ideoque nec levi commaculari crimine, nupturientes qui ad matrimonium accedant haud servatis praeceptis ab Ecclesia naviter statutis ut christianae nuptiae licite, et praesertim valide, ineantur aptaeque praeterea evadant ad uberes sacramenti fructus comparandos."

Then the instruction continues:

> "Et quidem iniuriam hanc atque culpam participant etiam administri Ecclesiae, qui nupturientes, etsi inconsiderate tantum, ad celebranda vetita connubia admittunt, graviter neglecto officio sibi commisso accurate explorandi ne contra Ss. Canonum statuta eadem nectantur."

In the case of an invalid marriage, therefore, it is the parties who commit the injury against the sacrament of marriage, whereas the negligent priest only participates in the sinful action. In other words, he is a cooperator only. The guilty

parties are the principals. Their failure to do what the law requires of them is the direct reason why an invalid contract was made.

In its specific directives the instruction *Sacrosanctum matrimonii* offers further support for this view. Not only does it require that each party be questioned separately, but a questionnaire is provided (which the local Ordinary may modify according to local needs) to be answered by both parties and signed by them as well.[1] Further each party is to be questioned about the freedom of the other.[2] Each is therefore responsible for the other's freedom as well as for his own. Finally, in an *adnotatio*, the Congregation orders that the signed questionnaires be kept on file as available evidence if the validity of the marriage is later attacked:

> " Hae iuratae depositiones alligentur actibus peracti matrimonii et transmittantur tribunali ecclesiastico competenti, quoties de valore matrimonii actio instituta fuerit quolibet ex capite."

From all this one can rightly conclude that deliberate concealment of a legal obstacle to the marriage by either party, whether this impediment affects himself or the other, puts him in the position of being responsible for any consequence that may follow. And now under the present regulations there will be concrete evidence of that responsibility, i. e., a signed questionnaire.

II

The foregoing observations throw much light on the meaning of the expression *fuerint impedimenti causa*. When we know what obligation the law imposes upon contractants before marriage, as far as responsibility for any impediment is

[1] Instr. *Sacrosanctum matrimonii—Acta Apostolicae Sedis*, XXXIII (1941), 297 ff. Cf. nn. 3, 5, 7, 9; Appendix: Allegatum I, n. 19.

[2] Instr. *Sacrosanctum matrimonii*, Appendix: Allegatum I, nn. 7, 8, 9, 11, 15, 16.

concerned, we can then readily understand what, in the eyes of the law, would make them the cause of an invalidating impediment. Since they are bound to reveal any legal obstacle they know to be present, it is reasonable to conclude that deliberate fraud on their part would be the real reason why they should be regarded *coram lege* as having caused the impediment to the marriage. Having posed as free to marry and having declared themselves to be such, they are responsible for the consequence of this fraud. With this supposed, let us examine each term of the expression *impedimenti causa* separately, in the light of the official interpretations of the Code Commission. This seems preferable to explaining the responses in their historical sequence.[3]

[3] The following is the text of the three responses of the Code Commission that are pertinent to our discussion:

D. Utrum vox *impedimenti* canonis 1971 § 1 n. 1°, intelligenda sit tantum de impedimentis proprie dictis (cann. 1067-1080), an etiam de impedimentis improprie dictis matrimonium dirimentibus (cann. 1081-1103).
R. *Negative ad primam partem, affirmative ad secundam.*
Datum Romae, die 12 mensis Martii anno 1929—*AAS*, XXI (1929), 171.

I: An, ad normam canonis 1971 § 1 n. 1°, habilis sit ad accusandum matrimonium coniux, qui metum aut coactionem, passus sit.

II. An, ad normam eiusdem canonis 1971 § 1 n. 1°, habilis sit ad accusandum matrimonium etiam coniux, qui fuerit causa culpabilis sive impedimenti sive nullitatis matrimonii.

III. An causa impedimenti honesta et licita a coniuge apposita obstet quominus coniux ipse habilis sit ad accusandum matrimonium, ad normam canonis 1971 § 1 n. 1°.
Ad. I. *Affirmative.*
Ad. II. *Negative.*
Ad. III. *Negative.*
Datum Romae, e Civitate Vaticana, die 17 mensis Iulii anno 1933—*AAS*, XXV (1933), 345.

D. Utrum, secundum canonem 1971 § 1 n. 1° et responsum diei 17 iulii 1933 ad II, inhabilis ad accusandum matrimonium habendus sit tantum coniux, qui sive impedimenti sive nullitatis matrimonii causa fuit et directa et dolosa, an etiam coniux qui impedimenti vel nullitatis matrimonii causa exstitit vel indirecta vel doli expers.
R. *Affirmative ad primam partem, negative ad secundam.*
Datum Romae, e Civitate Vaticana, die 27 mensis Iulii anno 1942—*AAS*, XXXIV (1942), 241.

The term "impedimenti"

The term *impedimenti* is to be taken in its more generic sense of a *legal obstacle* to the contract. Though the term *impedimentum* has a stricter and more proper meaning of personal disability, barring one from entering the contract of marriage, and is so used in cap. II, III, IV of *De Matrimonio* (tit. VII, libri III) of the Code, it has the meaning in canon 1971 § 1 - 1° of any obstacle to the validity of a marriage, even an impediment improperly so-called. This ruling of the Code Commission conforms to the pre-Code interpretation of the same law. For example, according to the *Instructio Austriaca,* a party responsible for error or unjust coercion, sufficient to invalidate the contract, could not attack the marriage as invalid, any more than an abductor or bigamist in bad faith might do so. Since the estoppel is decreed because of a culpable action, it should not depend on a technicality. Regardless of why the legal obstacle exists or what its technical form or designation is, the party responsible for it as a *causa* is barred from bringing suit against the marriage on that grounds.[4] If, however, there are other grounds of which he is not the *causa,* he could lawfully attack the marriage on that basis.

The term "causa"

The act of causing an impediment in the sense of canon 1971 § 1-1°, being that of a human agent, will have a double aspect —the *objective* external action under the control of the will and the *subjective* attitude and intent of the agent. Both phases of the act have been explained more fully in the 1933 and 1942 decisions of the Code Commission. Thus we have a clearer idea of what is required for a contractant to become

[4] For a similar reason it seems improper to limit the meaning of *impedimentum* as used in canons 1019-1034. Since the fundamental purpose is to bring to light anything that would cause the marriage to be invalid or unlawful, it would seem that the law obliges all concerned to make known any legal obstacle of which they are aware.

the *impedimenti causa* and for that reason estopped from attacking the validity of his marriage.

OBJECTIVELY one must be

1. *an active cause.* Strictly speaking a person coerced by grave fear into marriage causes the resulting nullity, since the marriage is invalid because his consent is defective. Nevertheless the Code Commission has ruled that he is not the *impedimenti causa* in the sense of canon 1971 § 1 - 1°. Presumably the same would be true of a person whose consent is defective by reason of substantial error of person or quality, when this has been induced by the fraud of the other. To be estopped, one must cause the legal obstacle *actively*, by taking the initiative, not merely by being acted upon.

2. *a direct cause.* The legal obstacle, according to the Code Commission, must be the direct effect of the " cause's " act. In other words, to be the agent only indirectly or *in causa* (" causa causae causa causati ") is not enough. A person might enter a marriage in substantial error because, through carelessness, he failed to take the necessary means to remove the error and thereby be responsible for it *in causa.* Or he might be careless in not heeding sufficiently an indication of a legal obstacle (v. g. the other's previous marriage or defective consent), or in accepting too readily the other's assurance that no such obstacle existed, and therefore fail to bring the matter to the attention of the pastor before marriage. In each instance the person in question is a cause, but not a *direct* cause, as the 1942 decision requires.

3. *of either the impediment or the nullity.* One causes an impediment, not as an isolated fact, but in relation to an actual contract. It is an impediment *only in so far as* it touches the contract, not apart from it. Prior to the contract it is a mere fact, an impediment *in potentia.* Concomitant with the contract it is a real *impedimentum.* Now one can effect this relationship with the contract in two ways: *antecedently* by performing an action, the legal effect of which he allows to perdure to the contract (with perhaps even the

underlying fact perduring, as in the case of a defective intention); or *concomitantly* by deliberate misrepresentation, with the result that an existing impediment invalidates the contract. An abductor is the cause of the legal obstacle to his marriage because he creates the required factual circumstance, the effect of which perdures to the moment of contract. Likewise one who denies a condition of consanguinity causes, by his positive deceit, a legal obstacle to invalidate his marriage. Voluntariness, and therefore imputability, depends not on the outward form of one's act, but on the real *nexus* between the will and the objective result produced. Taking this view, the Code Commission has ruled that one causes the invalidating legal obstacle, in the sense of canon 1971 §1 - 1°, whether the impediment as such or whether only the nullity of the marriage can be imputed directly to him. In the first case the legal obstacle invalidates the contract because he caused it, and therefore its legal effect, to exist; in the second case it invalidates because, though obliged to reveal it, he fraudulently concealed its existence. In both cases the invalidity is due to his action. He is the *impedimenti causa.*

Subjectively one must be

1. *not blameless.* According to the Code Commission, one who causes a legal obstacle to the marriage without however committing any moral fault and acting fully within the law, and who therefore is a *causa honesta et licita* of the invalidity, is not estopped. When neither the moral nor the positive law has been violated in causing the impediment, it would not be reasonable to deprive a person of a normal legal right. Thus one who contracts marriage conditionally, with due authorization of the local Ordinary,[5] later may attack the marriage on the grounds that his enjoined condition has not been fulfilled. Similarly a person who simulates consent under the stress of grave fear would not be estopped. His simulation is free of blame.

[5] Instr. *Sacrosanctum matrimonii,* n. 17; canon 1031 § 1-3°.

2. *but guilty.* To be estopped it is not enough for a contractant to be the objective cause of the invalidating legal obstacle; he must be guilty of a moral fault in being its cause actively and directly. His causal action, according to the Code Commission, should be *culpabilis.* The deprival of the right to bring suit against the marriage issues *solely* from a blameworthy action. Because he has done wrong, and only because of that, one is estopped.

3. *of deceit.* The Code Commission has decided that the cause of the impediment must be *dolosa* to be estopped. Since each party to a marriage *in facie Ecclesiae* is directly obliged to reveal any impediment he knows to exist, since furthermore it is only as the marriage is being contracted that a certain factual condition actually *impedes* the contract, we can readily see what would make one an *impedimenti causa dolosa.* It would be his wilful deceit, in declaring directly and formally that no impediment existed. Because of that, the impediment as a legal obstacle to the contract, as actually impeding the contract, is imputable to him. His fraud precluded the pastor arranging and assisting at the marriage from fulfilling his duty of preventing the unlawful marriage, as the instruction *Sacrosanctum matrimonii* (n. 2) requires: "ut, si reapse impedimenta adsint, actuose studeant ea auferre aut secus nupturientes infecto coniugio dimittant. Tale praeceptum continetur et in can. 1020 Codicis I. C . . . . . ". This deceit is the positive and direct cause of the invalidation of the contract, for such fraud is a positive act.[6] If one deliberately denies having information which the priest is seeking to discover, whether it affects himself or only the other party, whether *as a fact* it is imputable to him or not, he is an *impedimenti causa dolosa* and therefore estopped. But an impediment one had brought into existence, which however he believed later ceased (e. g. if a religious in solemn vows

[6] *Dolus* is traditionally defined as *omnis calliditas, fallacia, machinatio ad circumveniendum, fallendum, decipiendum alterum adhibita.* Such deceit is certainly positive in character and any consequence following from it is a direct effect.

thinks himself secularized), might be concealed because of good faith, and one would therefore be *doli expers*.

III

It is now necessary to defend, by positive argument, the hypothesis just proposed. To facilitate this task, the issue should be reduced to its simplest terms. The crux of the matter is this: *how*, in what concrete way, does a contractant cause an impediment, in the sense of canon 1971 § 1-1°? That is the fundamental question. There are two possible answers to it. The first is, by causing the actual impeding of the contract, being responsible directly for that; the second is, by causing the fact at the basis of the impediment. It is the first view that the writer upholds, viz., that by fraud at the time of the contract, a party causes the legal obstacle to the contract, not *ut sic* by causing that obstacle to exist. This view appears to harmonize best with the decisions of the Code Commission, and furthermore is in accord with the norms in force prior to the Code. Let us therefore proceed to take up each of these points.

I. *Argument "ex textu legis" (canon 18).*

As in the presentation of the writer's hypothesis, so also in its defense it is better to take the words *impedimenti causa* in order, as they have been explained by the Code Commission, and deduce from the wording of the official interpretations the exact meaning of the law. In fact, the interpretations are now part of the law. Let us see what they imply.

The term "impedimenti"

The effect of the cause's action must be an *impedimentum*. This the Code Commission has told us means any legal obstacle to the contract contained in the law from canons 1067-1103. By the very fact that the canons are cited in the official decision, from the first possible one to the last one, we must conclude that in any case estoppel is possible. Now, of all the impediments enumerated, exactly six could not

possibly be brought into existence as *facts* by either party—age, disparity of worship, consanguinity, affinity, ignorance of the nature of marriage, absence of necessary witnesses. Five others, though caused *as facts* by one or both, could not because of that be regarded as in any way blameworthy, viz., ligamen, sacred orders, solemn vows, spiritual relationship, legal relationship. Therefore of *twenty one* possible grounds of nullity, only *ten* could be culpably imputed *as facts* to one or both parties—impotence if induced, crime, public propriety, substantial fraud, defective intention, coercion, illegal withdrawal of a mandate for marriage, an invalidating or otherwise illegal condition, coercion of the pastor. It is difficult to believe that the all-inclusive statement of the Code Commission was meant to be restricted to the last category of impediments. What would be the underlying reasons for such a limitation? It certainly does not accord with the law in force before the Code, as will be seen. *Ubi lex non distinguit, nec nos distinguere debemus.* If, on the other hand, we regard the act of fraud, in misrepresenting oneself and the other party as free *coram Ecclesia* to marry, as the causal act required by canon 1971 § 1-1°, then the ruling of the Code Commission as to the meaning of *impedimentum* is completely understandable. Regardless what the legal obstacle is, the party guilty of fraud is estopped. For in every such instance he has caused the impeding of the contract.

The term "causa"

Having specified what the objective effect must be, the Code Commission in two later decisions explained to some extent what was necessary to be its *causa*. The terminology of these decisions, at least in part, also seems to favor the hypothesis advanced above.

"Sive impedimenti sive nullitatis"

The defenders of the view that the impediment is caused by causing the fact are confronted with a real difficulty in explaining this disjunctive phrase. Some have had recourse

to the obvious distinction between impediments properly so-called (canons 1067-1080) and those improperly so-called (canons 1081-1103). By using *impedimentum* and *nullitas* the Commission, it is said, referred respectively to the two categories of invalidating legal obstacles, thereby reiterating a point made in its 1929 decision. This explanation, however, really puts the Commission in the position of using redundant and irrelevant terminology. Why should it waste its words on what was already settled beyond doubt? That would hardly be in keeping with the conciseness characteristic of modern canon law. Furthermore, this interpretation overlooks the fact that in its very next response the Commission clearly envisioned a case of conditional consent and in this connection used the expression *causa impedimenti honesta et licita*, thus again giving *impedimentum* its broader meaning. It could hardly be that, after giving a word a specific meaning, the Commission would then turn around and depart from that meaning.

The other explanation advanced is even less satisfactory. Roberti, one of the defenders of the *causa facti* interpretation (with however a distinctive twist of his own), holds that what seems to be at first sight disjunctive is really copulative, i. e., "*sive . . . sive . . .*" is to be taken as "*et . . . et . . .*". Without explaining why, he says the grammatical construction calls for this conjunctive meaning.[7] It is true that a copulative usage of "*sive . . . sive . . .*" is not unknown, but it is certainly rare. It is hardly the proper meaning of the words, or the customary usage, that canon 18 directs us to take. When in its 1942 decision the Commission wished to convey the meaning of a double conjunction, it did make use of the customary construction "*et . . . et . . .*". It is not likely that on successive occasions, and even within the very same response (of 1942), the Commission would adopt such varied forms to convey the same idea. For this reason Roberti's explanation, as

[7] *Apollinaris*, VI (1933), 443 (cf. however *o. c.* XII [1939], 267 ff.).

well as the preceding one, fails to give a satisfactory meaning to *sive impedimenti sive nullitatis.*

On the contrary, these words of the Code Commission can be taken in their obvious disjunctive sense and at the same time contribute positively to a fuller understanding of the phrase *impedimenti causa*, if the interpretation proposed in this paper be adopted. Having previously decided that *impedimentum* is to be taken in its broader meaning, the Commission rules the same for the term *causa.* The impediment is caused, in the sense of canon 1971 § 1-1°, whether one causes it as such or whether one causes the nullity resulting from it. The phrase *impedimenti causa* is broad enough to embrace both possibilities. This in turn suggests that the causal act must be *in se* such as to cover either the eventuality of the impediment being caused or that of the nullity being caused. The act that fulfills this requirement is fraud by either party during the premarital investigation. A contractant would cause the impeding of the contrast by fraudulently concealing a legal obstacle he himself caused to exist (a *factum proprium*) or one not induced by him (a *factum alienum*). In the first instance the impeding of the contract is imputable to him because he caused the legal obstacle both as a fact and as a barrier to the contract (the latter because of the fraud perpetrated despite his obligation to make known any impediment). In the latter instance the impeding of the contract is imputable because the legal obstacle, at least to the extent it is a barrier to the contract, can be blamed upon his fraud.

"Et directa et dolosa"

Many have seen in these words full confirmation of the view that an impediment is caused, in the sense of canon 1971 § 1-1°, by causing it as a fact. Such an act of causality is, they have said, *direct* and, when performed with deliberate intent, involves criminal *dolus.* It is such cases of direct, malicious causality that the Commission had in mind. But here once again we are faced with an interpretation that makes the Commission appear to have resorted to useless

wording in order to explain its mind. Criminal *dolus* necessarily supposes a direct causal act, simply because it involves a *deliberata voluntas*, i. e., the result of the act is not only foreseen but intended as well. It is this very element that distinquishes *dolus* from criminal *culpa*, which involves only indirect causality, i. e., the effect is the result of culpable negligence. It is true that *dolus* itself may be direct or indirect. But this division has no bearing on our problem. We are concerned with a direct *causa*, not direct *dolus*. If, therefore, the Commission intended to require a direct, malicious causal act, it could simply have used the phrase *causa dolosa*. That would have conveyed its mind fully. Instead it added, with evident purpose, the term *directa*, and furthermore, showing that the two qualifying words were entirely distinct and separable in its mind, it linked them in the emphatic conjunctive construction "*et . . . et . . .*". This construction could hardly be a mere redundancy.

On the other hand, there is a real point to the insistence by the Commission that direct causality is essential, if we suppose that fraud during the premarital investigation constitutes the act of causing the impediment. A contractant who fraudulently conceals a legal obstacle he himself caused to exist (a *factum proprium*) is a *causa et directa et dolosa*. By his fraud he is the direct cause (humanly speaking) of the impeding of the contract. The same is true if a contractant fraudulently conceals a *factum alienum*—an impediment existing independently of the action of the parties (e. g. consanguinity) or one due solely to the action of the other party. But it could also happen that a *factum alienum* might be concealed because, through negligence or a misguided trust in the veracity of the other party, a contractant failed to reveal circumstances to the priest which would have given him grounds to suspect the presence of an impediment. In this case there is a certain degree of deceit, yet the consequent impediment is imputable only indirectly or *in causa*. Thus it was necessary for the Commission to emphasize that direct as well as deceitful causality was required for the estoppel to take effect.

II. *Argument "ex veteris iuris auctoritate" (canon 6)*

A fundamental and decisive question in the interpretation of canon 1971 § 1-1° is whether its restrictive clause has been derived from the pre-Code regulations governing estoppel, or whether it has been enacted independently of these norms. The reason for this should be clear. If the two laws are independent of each other, then the law of the Code is to be interpreted *solely* according to its own wording. On the other hand, if the present estoppel derives from the old law, we must take its ordinances and interpretation into account in interpreting and applying the wording of the Code. To the extent that the two laws are in agreement, they are to be similarly understood (canon 6, 2°-4°).

From a formal point of view, there is an actual difference between the two laws. The pre-Code law took the form of specific norms covering particular cases of invalidity. On the other hand, as is well known, the Code enunciates a general inclusive principle, leaving us to make the necessary deductions and applications.[8] Therefore it can only be because of

[8] The following sections of the *Instructio Austriaca* (*Acta et Decreta Conciliorum Recentiorum* [*Collectio Lacensis*], [7 vols., Friburgi Brisgoviae, 1870-1890], V, 1302 ff.) were the most recent and most complete presentation of pre-Code law on the right to attack the validity of a marriage:

115. Matrimonium impugnandi jus, in quantum haud expresse ad conjuges restringitur, competit catholico cuivis, exceptis iis, qui sua hac in re commoda quaerere suspecti sunt, vel quamvis matrimonium contrahendum esse sciverint ac proclamationes debito modo institutae fuerint, impedimentum tamen absque legitima excusatione silentio reticuerunt.

116. Propter errorem et coactionem injustam ea tantum pars, quae in errore versata aut cui consensus coactione injusta extortus est, matrimonium accusare potest. Jure suo excidit, quando, postquam errorem agnovit aut metus, qualis ad matrimonium irritandum sufficit, cessavit, debitum conjugale voluntarie ac scienter praestiterit vel etiam, quin circumstantia ista probari possit, conjugale vitae consortium per sex menses voluntarie continuaverit.

117. Quando nuptiis sub conditione jungi per exceptionem conceditur, matrimonium propter conditionem non impletam ab eo tantum conjuge accusari potest, qui neque in conditionem positum adesse falso asseveraverit, aut id non adesse dolo reticuerit neque sua culpa impedierit, quominus conditio impleretur. Renuntians conditioni accusandi jure se exuit.

the same content that the two laws governing estoppel are in agreement, i. e. because both laws estop the same persons from attacking a marriage.[9] And this is the crux of our discussion at this point, the question that must be decided. Are the two laws in agreement *materialiter* despite their different formulation? It is the writer's opinion that *substantialiter* the laws are the same, intended to cover the same situation. Or to put it another way, the general principle of estoppel in the Code is meant to cover all the particular cases governed by the pre-Code norms. Let us proceed to examine the reasons for this viewpoint.

The following persons were estopped by the pre-Code law on the basis of culpable action *before the marriage*, thereby forfeiting a right that would otherwise be enjoyed. A contractant was estopped who would fraudulently lead the other party to believe that an enjoined condition would be fulfilled

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118. Propter impotentiam matrimonium consummandi, nisi notoria sit, conjuges tantum matrimonium accusare possunt.

119. In valorem matrimonii, cui impedimentum impubertatis obstat, pubertate impleta inquirendum non est, nisi id exigat conjux, qui matrimonii contracti tempore pubertatem nondum attigerat.

120. Propter impedimentum raptus raptor adversus matrimonium reclamare nequit. Rapta, quae raptui consensit, suo matrimonium accusandi jure in exordio libertatis plene recuperatae utatur; alias non amplius audiatur.

121. Impedimento ligaminis mutatione facti sublato, quando una pars, dum invalidas celebraret nuptias, impedimenti existentiam absque sua culpa ignoravit, altera, quae impedimenti conscia fuerat, matrimonium accusandi jure haud potitur.

122. Omnibus casibus et propter omnia impedimenta, quorum respectu jus accusandi conjugibus aut uni ipsorum haud privative competit, tribunal matrimoniale ex officio procedere debet, quamprimum aut notorietate facti aut denuntiationibus allatis aliove modo sufficiens rei ratio subministrata fuerit.

[9] The two laws certainly differ *as to the right to attack a marriage*. The faithful no longer enjoy the right to bring suit in the case of an impediment *publici iuris*, as they did prior to the Code. On the other hand, both parties have an equal right to attack a marriage on the grounds of substantial error or grave fear, though formerly only the victim of such error or fear had this right. This last point was settled definitively by the 1929 response of the Code Commission.

or who would deliberately prevent its fulfillment; so also an abductor, a bigamist who remarried in bad faith, any person who failed beforehand to reveal the impediment now alleged as the grounds of nullity, though denunciation at the time was possible and feasible. Furthermore, many authors taught (despite the unqualified wording of the law) that in cases of grave fear and substantial error even the party whose consent was valid could bring suit, provided he was entirely blameless and free of all *dolus* in the matter.[10] Here, too, estoppel is made to depend solely on a culpable action. It was also held by a few that a contractant aware before marriage of the impotence of the other party could not subsequently attack the marriage on that grounds.[11] From all this, therefore, it is quite clear that if one wished to formulate a general norm to cover all these cases, he could do no better than to use the wording of the present law " nisi fuerint causa culpabilis sive impedimenti sive nullitatis ". That principle would include all the cases enumerated in the pre-Code law, though it would also be applicable to other cases of nullity as well.

If we pursue the matter further, we shall find that in the text of the law itself a specific reason is given for the estoppel in several of the above instances. This is the principle already advanced in this paper as the basis of the deprival enjoined in canon 1971 § 1-1° of the Code.

> " Sane illi quibus scientibus et tacentibus matrimonium est contractum non sunt contra ipsum ulterius audiendi."[12]
>
> " Qui sponsalia interfuerint et tacuere quaesiti, non sunt postea recipiendi, si velint contra matrimonium aliqua confiteri, nisi de his aliqua velint dicere quae in veritate postea dedicerunt ".[13]

[10] Sanchez, *De Sancto Matrimonii Sacramento* (Venetiis, 1712) l. IV, d. 15, n. 3; Wernz, *Ius Decretalium* (2. ed., 6 vols., Romae et Prati, 1906-1913), IV n. 269—" compars prorsus *inculpabilis* et *doli expers* ".

[11] Cf. Wernz, *o. c.*, n. 349.

[12] C. 1, X, *qui matrimonium accusare possunt, vel contra illud testificare*, IV, 18.

[13] C. 2, X, *qui matrimonium accusare possunt, vel contra illud testificare*, IV, 18.

"Quum non prodierit in publicum quando banna secundum consuetudinem in ecclesiis edebantur . . . . tanquam suspectus est procul dubio repellendus".[14]

"Nec dignum est, ut praedictus vir, qui scienter contra canones venerat, lucrum de suo dolo reportet."[15]

It is true that, in the context, the first three of these texts apply to cases in which others than the parties to a marriage were seeking to attack its validity. Nevertheless these passages are pertinent to our discussion. First, because they enunciate a general principle, in itself applicable to all such cases of fraud, regardless who the guilty parties are. Secondly, they express a reason why the persons who enjoy the right to attack a marriage should be deprived of that right. And that is our problem, even though presently it can only be the parties to a marriage who are so estopped, because they alone (outside the Promoter of Justice) can act as plaintiffs in a suit of nullity. To repeat, we are comparing the old law and the new merely from the point of view of estoppel, to discover the similarities, not from the viewpoint of the basic right to bring a suit. We are interested, not in the rule, but the exception.

In view of these specific rulings, it is understandable why various authors, proposing before the Code the general rules governing estoppel, gave *as the only pre-matrimonial grounds* the culpable concealment of an invalidating obstacle when the marriage was announced (carnal copulation in some instances, seeking base gain, and the filing of suit by letter were the post-matrimonial causes of estoppel).[16] To support

[14] C. 6, X, *qui matrimonium accusare possunt, vel contra illud testificare*, IV, 18.

[15] C. 1, X, *de eo, qui duxit in matrimonium, quam polluit per adulterium*, IV, 7.

[16] Reiffenstuel, *Jus Canonicum Universum* (5 vols. in 7, Parisiis, 1864-1882), IV, tit. 18, nn. 9-13; Mansella, *De Impedimentis Matrimonialibus* (Romae, 1881), VI, art. 2, n. 6; De Luca, *Praelectiones Iuris Canonici: De Iudiciis Ecclesiasticis* (Romae, 1897), n. 298; Bouix, *De Iudiciis Ecclesiasticis* (2 vols., Parisiis, 1855), II, 431-432; Wernz, *Ius Decretalium*, IV, n. 743.

these deductions the foregoing reasons set forth in the law were repeated. A person who had the opportunity to prevent an invalid marriage falls under suspicion if later he turns around and attacks its validity. It is not right that he be allowed to take advantage of his own culpable disregard of the legal obligation to reveal an existing impediment.[17] When, therefore, the Code in its turn estops one who causes an impediment, it is reasonable to conclude that the causal act is that which all agreed, prior to the Code, would deprive a person of his right to attack a marriage as invalid.

The writer would again emphasize that he is not asserting that the pre-Code law and that of the Code are identical as to the *ius accusandi*. There are important differences on that point. Nor is he maintaining that the reasons for estoppel in force prior to the Code are still in effect. The *post matrimonium* reasons have been dropped, at least as such. One is now estopped only as the *impedimenti causa*, because of a culpable action prior to the marriage. Since the exact nature of this action is in dispute, it seems proper to look to the pre-matrimonial cause of estoppel, in effect up to the Code, as the forerunner of the present debarment. Such a deduction is not only sanctioned but even demanded by the norms of canon 6-3°: "Canones qui ex parte tantum cum veteri iure congruunt, qua congruunt, ex iure antiquo aestimandi sunt".

Perhaps objection might be voiced against this conclusion because of the absence of all references to pre-Code sources as a footnote to canon 1971 § 1 - 1°. Would that not suggest that this part of the canon is brand-new legislation, enacted independently of the pre-Code norms? Though at first sight this might seem to be a formidable objection, really it is not. We all understand that the footnote citations are not part of the law. They come from a private source, not from the legislator. Therefore, at most, they have only the force of private interpretation. And, in this case, the absence of all

[17] Cf. c. 3, X, *de clandestina desponsatione*, IV, 3.

citations is not greatly significant. As Cardinal Serédi, who played an important role in assembling the citations for each canon, has cautioned: "etiamsi quidam fontes in Codicis notis forte non indicentur, eundem tamen post Codicem valorem habent, quam haberent, si in Codice allegati fuissent, quia fontes ex ipsa citatione in notis facta nullum peculiarem valorem iuridicum obtinent".[18] To draw a conclusive argument from the omission of a citation, according to Van Hove, one would have to prove that this was intentional.[19] That would be a difficult fact to establish. We may speculate as to why all citation of pre-Code sources was omitted, but we are not justified in concluding that the real reason was to enact a provision that would be completely independent of all previous regulations and founded upon an entirely different basis.

The following observations of Noval will provide a fitting summary and conclusion of this point: "est error gravissimus, et omnino rejiciendus, credere quod ad intelligendum Codicem, et ad interpretandum verum sensum singulorum canonum sufficit callere linguam latinam, ac materias theologicas, quae in ipsis attinguntur; et quod ad quancumque controversiam recte decidendam juxta praescripta juris novi, satis est praescripta Codicis in mente figere aut pro re nata consulere et in sensu obvio applicare . . . Et re quidem vera, ad dijudicandum de vero sensu, non dicamus singulorum, bene vero praecipuorum canonum Codicis seu juris novi, opus est scire: primo, utrum de materia concreta in illis pertracta exstaret in jure antiquo aliquod praescriptum; secundo, num illud praescriptum sit juri novo certe oppositum an tantum dubie, nam in priori casu jus novum, in altero autem jus vetus praevalet; tertio, si vetus praescriptum cum novo congruat, quamnam interpretationem apud probatos auctores illud receperit".[20]

[18] "De Valore Juridico Fontium Codicis Juris Canonici"—*Jus Pontificium*, I (1921), 64.

[19] *Prolegomena ad Codicem Iuris Canonici* (Mechliniae, 1928), n. 366.

[20] Noval, *Codificationis Juris Canonici Recensio Historico-Apologctica*, nn. 71, 70, as quoted by Michiels, *Normae Generales Juris Canonici*, I (Lublin: Universitas Catholica, 1929), 115-116.

IV

Assuming, therefore, that a contractant becomes the cause of the impediment to an invalid contract by his *dolus* during the pre-marital investigation of free state and by this fact is estopped from bringing suit against the validity of the contract, we can formulate certain practical conclusions to serve as norms for the application of canon 1971 § 1-1°. In view of the tentative nature of the foregoing study, the deductions to follow are, of course, presented only as provisional and probable.

1. Canon 1971 § 1-1° applies solely to the so-called solemn judicial procedure. For it is only in that process that one of the parties could stand in court as an *actor* with the *ius accusandi*. The shorter or excepted procedure, allowed by canon 1990 ff. for certain specified cases, is formally initiated by the Ordinary himself, without the need of any formal accusation against the marriage, directly on the basis of *prima facie* evidence that is equivalently notorious (*notorietate iuris*), i. e. a legal document that *per se* establishes the initial fact. The process which the Ordinary initiates is *ex notorio*.[21] Therefore there is no place for an *accusatio*, and there could not be an estoppel of the *ius accusandi*.

2. A contractant is estopped only if he violated the obligation imposed by canon 1020 § 2, as supplemented since 1941 by the instruction *Sacrosanctum matrimonii*. This means that only in the instances that the attempted marriage was contracted *in facie Ecclesiae*, when alone the pre-marital investigation is imposed by law, would a contractant be deprived of the right to begin a formal process against his marriage. Only in this instance could there be the *dolus* or fraud required for the estoppel. Consequently, any marriage contracted *extra Ecclesiam* would be subject to attack, even

[21] Wernz-Vidal, *Ius Canonicum* (7 tom. in 8 vols., Romae: Apud Aedes Universitatis Gregorianae, 1923-1938), V, 794; Lega, *Commentarius in Iudicia Ecclesiastica* (curante V. Bartoccetti, 2 vols., Romae, 1938-1939), II, pp. 636,637.

though the parties entered it in bad faith, aware of their sinful action.

3. However, to be estopped, a contractant must actually be guilty of *dolus*. Therefore he must have been interrogated explicitly, as canon 1020 § 1 requires, and directly deny that an impediment exists. Must he be interrogated specifically about the impediment which later is the grounds for his accusation against the marriage? It is the writer's opinion, though proposed only conjecturally, that this is necessary in order to establish beyond all doubt the fact of *dolus*. Certainly if the provisions of the instruction *Sacrosanctum matrimonii* are followed, there could be no difficulty on this score. The questions and answers would be specific and duly recorded.

4. The right of attack is in possession. Its loss is not initially presumed. It is the duty of the defendant or the Defender of the Bond to prove that the plaintiff is estopped because of *dolus*. Thus it will be necessary to prove (unless of course he has so confessed in his *libellus*) that, at the time of the pre-marital inquiry, the plaintiff was aware of the impediment, the existence of which he nevertheless then explicitly denied. The fact of his denial can be established from the signed questionnaire or the testimony of the pastor who conducted the pre-marital investigation (canon 1791 § 1). The fact of his knowledge, at the time, of the impediment must, as a rule, be presumed if it supposes a *factum proprium* (canon 16 § 2). Likewise his knowledge of any fact notoriously known should generally be presumed. Otherwise his knowledge of some factual condition or of the other party's action has to be established in the ordinary judicial manner —by means of witnesses, documents and presumptions.

5. Many regard the deprival of canon 1971 § 1-1° as a penal enactment. This appears to be the present mind of the Sacred Roman Rota.[22] Such an interpretation would not alter in

[22] *Decisiones S. R. Rotae*, XX (1928), 405; cf. also a decision of June 18, 1940 as reported in the *Ephemerides Iuris Canonici*, I (1945), 168, nota I.

any way the conclusions that have been reached. The estoppel is simply a penalty incurred *ipso facto* because of fraud during the pre-marital investigation, just as canon 2387 decrees an *ipso facto* penalty because of fraud perpetrated by a cleric to gain admission to religious profession. This would not change the fact that the *dolus* of a contractant would have to be certain for him to be declared lawfully estopped. For a penalty is never to be inflicted unless the crime prescribed has been certainly committed (canon 2233 § 1). And guilt is presumed, only following such a violation (c. 2200 § 1). It would not be necessary, however, for a contractant to know at the time that his fraud would be penalized by estoppel (canon 2229 § 3-1°), though the instruction *Sacrosanctum matrimonii* [23] directs that the pastor warn the parties of the estoppel if he suspects that either is entering marriage with an invalidating intention or condition. Once the fact of fraud is clearly established, the plaintiff must desist from his suit of nullity.

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[23] Appendix: Allegatum I, n. 16.

The sovereign who wages an unjust war "is answerable for all the evils and all the disasters of the war. . . He is guilty towards the enemy, whom he attacks, oppresses, and massacres without cause; he is guilty towards his people, whom he leads into acts of injustice, whom he exposes to danger without necessity or reason. . . ; finally he is guilty towards all mankind, whose peace he disturbs and to whom he sets so pernicious an example."—Vattel, *Droit des Gens*, translated in *Classics of International Law* (1916), 302.

Cases and Studies

INFALLIBILITY OF THE POPE IN HIS DECREE OF CANONIZATION.

A discussion of papal infallibility in canonizing Saints entails a preliminary consideration of several points concerning the nature of canonization, its manifold distinction from beatification, and the discipline of the Church from early times.

Canonization is the final and definitive sentence of the Roman Pontiff whereby some servant of God is declared to be among the Saints of Heaven, and whose veneration is enjoined upon the universal Church.[1] With few exceptions, Decretalists define canonization as an act by which some servant of God is inscribed in the catalogue of Saints by the Pope. It is, moreover, an act containing a public, solemn, and canonical declaration, definition, and proclamation that the servant of God is to be honored by all as a Saint, and that in his behalf there be celebrated on a certain day each year a solemn office.[2]

Canonization may be either formal or equivalent. An express decision, issued after the procedural norms have been complied with, constitutes the formal canonization. Equivalent canonization is a decree adjudging some servant of God a Saint in virtue of the veneration that has been shown him for a long period of time.[3]

Beatification, too, may be either formal or equivalent; it is a decision permitting the veneration of some servant of God in a par-

[1] Wernz-Vidal, *Ius Canonicum,* IV, (Romae, 1934), n. 459; De Guibert, *De Ecclesia Christi,* (Romae, 1928), n. 349.

[2] Fagnanus, *Commentaria In III Librum Decretalium,* (Venetiis, 1729), tit. 45, cap. 1, n. 2; Joannes Andreae, *In Tertium Decretalium Librum Novella Commentaria,* (Venetiis, 1581), tit. 45, cap. 1, n. 2; Antonius a Butrio, *In Librum Tertium Decretalium Commentarii,* (Venetiis, 1578), tit. 45, cap. 1, n. 4; Innocent IV, *In Tertium Decretalium,* (Venetiis, 1570), tit. 45, cap. 1, n. 1.

[3] Cf. Benedict XIV, *De Servorum Dei Beatificatione et Beatorum Canonizatione,* (Prati, 1839), lib. I, cap. 41, n. 1; Pius XI, in his decretal letters, "*In thesauris*", December 16, 1931, by means of equivalent canonization enjoins the veneration of St. Albert the Great (1193?-1280) upon the universal Church; see *Acta Apostolicae Sedis,* XXIV (1932), 1-15.

ticular territory, for example, in a diocese, but it is not extended to the universal Church.[4]

Many differences can be discovered between canonization and beatification. The chief points of difference are: beatification is a sentence or decision that is not definitive, and hence, subject to change, while, on the contrary, canonization is absolutely immutable. Beatification, according to the theologically and canonically more true opinion, and held as certain by all modern canonists, does not imply the charisma of infallibility, that is, it is not an infallible decree, while canonization requires an absolute and infallible decision. Beatification implies the permission of veneration and that within certain defined limits, while canonization implies universal veneration, a precept imposed upon the entire Church. Beatification is an act which, considering its nature, may be decreed by an inferior ecclesiastical authority, e. g., by Bishops, as in the first centuries of the Church, while canonization, at least formal canonization, is a major cause, by its very nature, whose final settlement belongs to the Pope. Beatification involves the invocation and veneration of some servant of God, but with certain restrictions, while canonization denotes public veneration, known in canon law as *dulia*,[5] which must be given to a servant of God, who is presented to us as a model to be imitated. For certitude of the act of beatification less rigorous formalities are required, while canonization by its very nature demands such formalities as are necessary for an infallible pronouncement.[6]

We must note, moreover, that the decree of canonization is disciplinary in nature rather than dogmatic for all the acts are scrutinized and weighed not by the Congregation of the Holy Office, but by the Congregation of Rites[7] which was established by Pope Sixtus V (1585-1590), in his Constitution "*Immensa*," in 1588.

Another fact to be borne in mind is that canonization of Saints pertains to the indirect object of the teaching authority of the Church, since it is proximately concerned not with the teaching power but with the exact determination and ordination of worship.

[4] Cf. Benedict XIV, *o. c.*, lib. I, cap. 42, n. 8.

[5] Canon 1277, § 2.

[6] Cf. Benedict XIV, *o. c.*, lib. I, cap. 39, 42.

[7] Canon 253, § 3.

The custody, exposition and defense of revealed faith and morals falls under the direct and primary object of the teaching authority of the Church.[8]

Until the fourth century, that is, during the time of the persecutions, veneration was rendered to martyrs only, namely, to those who suffered torments and death for Christ. Benedict XIV (1740-1758) distinguished three classes of martyrs. Some were called designated martyrs (*martyres designati*), others consummated or crowned martyrs (*martyres consummati sive coronati*), and others were known as vindicated martyrs (*martyres vindicati*).[9] According to Benedict XIV, " designated martyrs are those, to whom the sentence of death has been intimated, but as yet has not been put into execution. . . ." [10]

" Consummated martyrs, or crowned martyrs, were those who died in torments, or shortly after tortures had been inflicted upon them. . ."[11] The latter are called by some [12] confessors, or confessed martyrs, which acceptation is probably derived from St. Cyprian (d. 258).[13] Private veneration was manifested only to confessed martyrs, while public veneration was reserved for vindicated martyrs whose happy death in the Lord was discussed and confirmed, and to whom according to the judgment of the Church veneration was shown.[14]

Martyrs were known as vindicated when sufficient evidence was gathered to prove their martyrdom. These proofs obtained force from the legitimate authority of the Church. In the early centuries

[8] Cf. Billot, *De Ecclesia Christi,* (Romae, 1898), Thesis XVII.

[9] Cf. Benedict XIV, *o. c.,* lib. I, cap. 2, n. 9.

[10] Benedict XIV (*l. c.*): " Martyres designati erant illi, quibus mortis sententia fuerat notificata, et adhuc non fuerat executioni mandata . . . "

[11] Benedict XIV (*l. c.*): " Martyres consummati, sive coronati erant illi, qui vel in tormentis, vel paulo post tormenta, ipsorum tormentorum violentia moriebantur . . . "

[12] Cf. Wernz-Vidal, *o. c.,* IV, n. 465.

[13] St. Cyprian (*Epist. 37,* cited by Benedict XIV, *l. c.*): " Cum voluntati, et *confessioni* in carcere et vinculis accedit morienti terminus, consummata martyris gloria est."

[14] Cf. Benedict XIV, (*l.c.*): [Martyres vindicati] " erant illi, quorum felix in Domino exitus fuerat discussus, et approbatus, et quibus iam fuerat cultus ecclesiastico judicio delatus."

of the Church the decision emanated from the Bishop or a provincial council. When a Bishop or a provincial council declared a martyrdom to be a true fact, letters were sent to the other churches.

In the early ages of the Church, notaries were appointed whose duty it was to receive news of the martyrs and to write an account of their martyrdom.[15]

In the course of time these martyrs were often called Saints, but they were styled indiscriminately as Illustrious, Servants, Blessed, Saints, and thus no precise terminology was established.

From the beginning of the fourth century (315), when peaceful relations were brought about between the Church and State by the Edict of Milan, public veneration was bestowed not only upon martyrs, but also upon those who exercised heroic virtue during their lives, and wrought miracles both before and after their death. Episcopal approbation, however, was required. They were called confessors.[16] Public veneration of these confessors was permitted by Bishops in a particular locality only, in some determined diocese, for there was no question of a true and properly so-called canonization, but of beatification, or as some termed it " particular canonization." [17] Decrees of beatification issued by individual Bishops did not extend to the universal Church, unless tacit or express authorization of the Pope followed.[18] St. Robert Bellarmine (1542-1621) declares that the veneration of the earlier Saints was introduced into the universal Church by custom, which obtained force " from the tacit or express approbation of the Roman Pontiff".[19]

Without a doubt, then, Bishops enjoyed the authority of beatifying martyrs or confessors till the tenth century, when the practice arose of having these causes treated by the Holy See, as is evi-

[15] Cf. Benedict XIV, *o. c.*, lib. I, cap. 3, n. 1.

[16] Cf. Benedict XIV, *ibid.*, cap. 5. Examples of such confessors are St. Anthony (c. 250-350), St. Hilarion (290?-371), St. Ephrem (306?-373?), in the Eastern Church, St. Martin of Tours (315?-399?), St. Hilary (d. 367?), in the Western Church. In the first centuries of the Church, those were called *confessors*, who, after being subjected to torture, escaped death, but not in any miraculous manner; see Wernz-Vidal, *ibid.*, p. 558, n. 465.

[17] Wernz-Vidal, *l. c.*

[18] Cf. Benedict XIV, *o.c.*, lib. I, cap. 7, n. 1.

[19] St. Robert Bellarmine, *Disputationes*, T. II, Controversia IV, Lib. I, " De beatitudine et canonizatione Sanctorum," cap. VIII, *in fine*.

denced by the solemn canonization of St. Udalric, Bishop of Augsburg, proclaimed by Pope John XV (985-996) in 993.[20]

The right of beatification was withdrawn from the Bishops by the Decretal of Pope Alexander III (1159-1181) in 1170, which expressly stated that it is illicit to venerate anyone as a Saint without the authority of the Roman Pontiff.[21]

This law gave rise to an acute controversy, namely, whether an entirely new law was enacted reserving the right of determing veneration of a particular servant of God to the Apostolic See, and depriving Primates, Bishops, and others, of the said right, by taking away from them the faculty they hitherto possessed in their dioceses and provinces, or, whether this privative right presupposed some former law, or a custom introduced long before, reserving this right to the Holy See.[22]

Notwithstanding this controversy, it is absolutely certain that Bishops never could decree canonizations in the true sense of the term. Since their jurisdiction was limited to a province, or diocese, they were incapable of imposing upon the universal Church the public veneration of some Saint.[23]

All doubt in this matter was removed by Urban VIII (1623-1644) in his Constitution "*Coelestis Hierusalem,*" of July 5, 1634 (*Fontes*, n. 213), whereby all negotiations referring to the granting of public cult to deceased servants of God was reserved to the Apostolic See. This disposition of Urban VIII was inserted in the present *Code of Canon Law* in canon 1999, § 1.

When indicating the differences between beatification and canonization, we stated that the latter was an irreformable and infallible decision. We will now indicate the principal arguments, which clearly demonstrate this infallibility.

[20] Other examples may be found in the above-mentioned work of Benedict XIV, lib. I, chapters 7 and 8.

[21] C. 1, X, *de reliquiis et veneratione sanctorum*, III, 45: "Non licere quempiam pro sancto venerari absque auctoritate Romanae Ecclesiae."

[22] Cf. Benedict XIV, *ibid.*, n. 6; cap. X, n. 4.

[23] Benedict XIV, *ibid.*, n. 6 says distinctly: "Numquam Episcopos potuisse veras peragere Canonizationes: praecipere etenim, ut aliquis tanquam Sanctus publico cultu colatur in universa Ecclesia, nec potest, nec potuit unquam ad eum pertinere, qui limitatam obtinet jurisdictionem in una diocesi, aut provincia, sed ad eum tantummodo, qui jus obtinet in universa Ecclesia."

Formerly, there were those who denied the infallibility of the Church in canonizing Saints. Wicleff (1320?-1384) was condemned by the Council of Constance (1414), because he called into doubt the sanctity of St. Augustine (354-430), St. Benedict (480?-543), and St. Bernard (1091-1153).

The possibility of error was admitted by the *Glossa ordinaria* which asserted that, although the Church could err in this matter, nevertheless, the honors bestowed upon such a person would be acceptable and most gratifying.[24] This interpretation was later accepted by Innocent IV (1243-1254) [25] and Hostiensis (d. 1271).[26]

Cajetan (Tommaso de Vio, 1469-1534) adhered to the negative view saying that even though the one canonized is not a Saint, but is condemned, the teaching of the Church could not be considered as mendacious or false, for this is not a matter of faith, and hence should be taken with a grain of salt. Canonization, he averred, is conditioned on the fact that it has been rightly performed. Human error, he stated, may intervene in the canonization of some Saint.[27]

According to Benedict XIV,[28] the words of Augustus Triumphus (d. 1328) [29] seem to deny the infallibility of the Pope in this matter.

[24] The *Glossa* in explaining c. un., *de reliquiis et veneratione sanctorum*, III, 22, in VI°, ad verba "Sedis Apostolicae" declares: "Etsi Ecclesia in Canonizatione erraret, quod non est credendum, licet accidere posset, nihilominus preces in honorem talis, acceptae et gratae sunt." The *Glossa* mentioned here is that of Joannes Andreae (Giovanni d'Andrea, d. 1348) called the *Glossa ordinaria*, of course, upon the *Liber Sextus* of Boniface VIII.

[25] Innocent IV, *In Tertium Decretalium*, cap. 1, n. 4.

[26] Hostiensis (Card. Henry of Segusio, d. 1271), *Summa Aurea*, tit. 45, cap. 1, n. 10.

[27] Cajetanus (*Opuscula*, [Lugduni, 1587], T. I, Tract. XV, "De indulgentiis." cap. VIII) states: "...dato quod iste canonizatus non est sanctus, sed damnatus, Ecclesiae doctrina aut praedicatio non esset mendax aut falsa: quia hic non pertinentia ad fidem non intelliguntur affirmari et praedicari nisi cum grano salis hoc est stantibus communiter praesumptis. Praesumit enim Ecclesia canonizationem rite factam." A little further on he adds: "Potest intervenire error humanus in canonizatione alicuius Sancti."

[28] Benedict XIV, *o.c.*, lib. I, cap. 43, n. 3.

[29] Augustus Triumphus, (*Summa de potestate Ecclesiae ad Joannem Papam*, [Romae, 1582], q. 14, art. 4): "Papa...canonizando aliquem Sanctum secundum praesentem justitiam non errat, quia sic credit, eum esse Sanctum, ut informationem recipit secundum allegata et probata sibi. Dicit autem

Augustus Triumphus apparently does not attribute infallibility to the Pope in the act of canonization, for he asserts that the latter bases his judgment on human information which may be false.[30]

Against those denying the charisma of infallibility of the Pope in canonizing Saints we have the common and certain opinion of theologians and canonists. The Popes, too, attributed absolute inerrancy in the formulae they employed in the very act of canonization.

The following theologians and canonists may be enumerated: St. Thomas (1225?-1274),[31] St. Robert Bellarmine (1542-1621),[32] Suarez (1548-1617),[33] Gregory of Valencia (d. 1603),[34] Melchior Cano (1509-1560),[35] Tanner (d. 1632),[36] but especially Benedict XIV (1740-1758),[37] who lists about seventy writers for the affirmative view;[38] the Decretalists: Fagnanus (d. 1678),[39] Gonzales (d. 1649),[40] Barbosa (1589-1649),[41] Reiffenstuel (1611-1703),[42] and

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Augustinus (in epist. 35, ad Severum Abbatem) commendantem eum de sanctitate, et scientia: Qui enim se credit, ut loquitur, etiamsi falsa loquatur, fideliter loquitur; qui autem non credit, quae loquitur, etiamsi vera loquatur, infideliter loquitur. Quantumcumque ergo Papa non vera approbat canonizando, vel ex quo fideliter approbando aliquem Sanctum et vere approbat secundum informationem sibi factam, non errat."

[30] Cf. Augustus Triumphus, *o.c.*, q. 17, art. 4.

[31] St. Thomas, *Quodlibetales*, (ed. De Maria, S.J., Tiferni Tiberini, 1886), quodl. IX, art. 16, p. 518.

[32] St. Robert Bellarmine, *o.c.*, lib. I, cap. IX.

[33] Suarez, *De Fide*, (Lugduni, 1621), Disp. V, Sect. VIII, n. 8.

[34] Gregory of Valencia, *In II-IIae S. Thomae*, (Lugduni, 1609), T. III, disp. 1, q. 1, punct. 7, n. 41.

[35] Melchior Canus, *De Locis Theologicis*, (Venetiis, 1759 , Lib. V, cap. V, q. 5, arg. 3.

[36] Tanner, *Theologia Scholastica*, (Ingolstadii, 1627), T. III, disp. 1, *De fide*, q. IV, dub. VII, n. 269.

[37] Benedict XIV, *o.c.*, lib. I, cap. 43, 44, and 45.

[38] *Ibid.*, cap. 43, nn. 4, 5, 6, 7, 8.

[39] Fagnanus, *Commentaria in III Librum Decretalium*, tit. 45, cap. 1, n. 28.

[40] Gonzales, *In Librum III Decretalium*, (Venetiis, 1699), tit. 45, cap. 1, n. 6.

[41] Barbosa, *Collectanea DD. in Jus Pontificium Universum*, (Lugduni, 1687), T. II, tit, 45, n. 5.

[42] Reiffenstuel, *Ius Canonicum Universum*, (Venetiis, 1735), T. V, tit. 45, n. 8.

many others. Of the recent writers we may mention Pesch (1836-1899),[43] Billot (1846-1931),[44] Wilmers,[45] De Guibert,[46] Beste,[47] Cocchi,[48] Wernz (1842-1914)-Vidal (1867-1938),[49] Vermeersch (1858-1936)-Creusen,[50] etc.

Arguments favoring the infallibility of the Pope in his decree of canonization may be reduced to the following. First of all, a denial of infallibility in this matter would militate against the right of the Church to determine the manner of worship, for if the Church were able to decide only in general that Saints should be venerated, and could not with absolute certainty declare that a particular servant of God should be honored, the power of determining the object of worship would be deficient.

It follows from the very sanctity of the Church that veneration rendered to saints in general would be less congruous, for the simple reason that many probably would be unworthy, and it would be repugnant to the sanctity of the Church if the Pope were to prescribe veneration for a particular deceased person who did not deserve special veneration.

The testimonies of the Popes carry special weight. Sixtus IV (1471-1484), in his Bull decreeing the canonization (1482) of St. Bonaventure (1221-1274) says: "We are confident that in this canonization God does not permit us to err."[51] Then he decrees that "it must be held faithfully and firmly that he [Bonaventure]

[43] Pesch, *Praelectiones Dogmaticae,* Tom. I, *De Ecclesia Christi,* (Friburgi, 1909), Prop. 51, n. 550 sq.

[44] Billot, *De Ecclesia Christi,* Thesis XVII.

[45] Wilmers, *De Christi Ecclesia* (New York, 1897), Lib. IV, cap. IV, art. II, n. 255.

[46] De Guibert, *De Christi Ecclesia,* nn: 349 et 350.

[47] Beste, *Introductio in Codicem,* (Collegeville, Minn., 1938), p. 630.

[48] Cocchi, *Commentarium in Codicem Juris Canonici,* Lib. IV, *De Processibus,* (Taurinorum Augustae, 1932), p. 513, n. 320.

[49] Wernz-Vidal, *o.c.,* IV, p. 554, n. 461.

[50] Vermeersch-Creusen, *Epitome Iuris Canonici,* (Romae, 1931), Tom. III, p. 139, n. 304.

[51] Benedict XIV, *o.c.,* lib. I, cap. 43, n. 2, where we find the words of Sixtus V cited: "Confidentes, quod in hac canonizatione non permittat nos Deus errare."

is a Saint." [52] Pope John XXII (1316-1334), in the canonization (1323) of St. Thomas Aquinas (1225?-1274), after mentioning the miracles wrought through his intercession, says that absolute credence must be given to the Divine testimonies (i.e., the miracles), for if we accept the testimony of men, the testimony of God is greater.[53] Clement VIII (1592-1605), in his canonization (1594) of St. Hyacinth (1185?-1257), declares that guided by the Holy Spirit who has been invoked numerous times, the Church cannot commit any error.[54] In his address delivered at the final consistory held in regard to the canonization of St. Didacus, Sixtus V (1585-1590), clearly demonstrates that the Roman Pontiff cannot err in the canonization of Saints.[55]

Several writers, as Cajetan, for example, cited St. Thomas in support of the negative view, against the infallibility of the Pope in canonizing Saints.[56] The words quoted by Cajetan, namely, "A human error may intervene in the canonization of some Saint" [57] are found in the second objection in the *Quaestiones Quodlibetales*,[58] which is solved by St. Thomas towards the end of the article in these terms: ".....that divine providence preserves the Church from falling into error in matters based on the fallible testimony of men".[59]

Tanner [60] claims that the words of St. Thomas, "The canonization of Saints is a medium between these two: since the honor we render the Saints, is a form of profession of faith, by which we be-

[52] Cf. Benedict XIV (*l.c.*): "Hunc sanctum esse, fideliter firmiterque teneri debere decernimus."

[53] Cf. Benedict XIV (*l.c.*): "Haec sunt testimonia tua Deus, quae de hoc viro iusto nobis credibilia facta sunt nimis. Nam si testimonium hominum accipimus, testimonium Dei maius est, quo animam eius coelum possidere iam credimus."

[54] Quoted by Benedict XIV (*l.c.*): "Spiritu S., quo Ecclesia afflatu numquam fallitur multis cum precibus invocato."

[55] Cf. Benedict XIV, *l.c.*

[56] Cajetan, *o.c.*, T. 1, Tract. XV, cap. VIII.

[57] *L.c.*: "Potest intervenire error humanus in canonizatione alicuius Sancti."

[58] St. Thomas, *o.c.*, quodl. IX, art. 16.

[59] *L.c.*: "quod divina providentia praeservat Ecclesiam ne in talibus per fallibile testimonium hominum fallatur."

[60] Tanner, *o.c.*, q. IV, dub. VII, n. 287.

lieve the glory of the Saints, we must piously maintain that even in these things the judgment of the Church cannot be erroneous," seem to be directed against the infallibility of the Pope. Although St. Thomas' expression here is somewhat labored, nothing can be alleged against the certainty of the conclusion.[61] The words " even in these things the judgment of the Church cannot be erroneous " convince us sufficiently of the Angelic Doctor's mind.

The doctrine of the infallibility of the Pope in his act of canonization is very plainly demonstrated elsewhere by St. Thomas. Humanly speaking, the Angelic Doctor explains, those at the helm of the Church may err in certain matters, but if we take into account Divine Providence, the Holy Spirit will ever direct the Church in teaching all truth pertaining to salvation; beyond any doubt the judgment of the universal Church cannot err in matters of faith.[62]

This is obviously a certain argument because by it St. Thomas intends to decide the question proposed at the outset, namely: " Whether all the Saints canonized by the Church, are in glory, or whether some of them are in hell ".[63] The answer revolves around the infallibility of the pronouncement of canonization by the Church. Replying to the first objection, St. Thomas says that the Pope, to whom pertains the canonization of Saints, can certify as to the state of any one by investigating his life and by the testimony of miracles; but chiefly through the inspiration of the Holy Ghost, who penetrates everything, even the innermost secrets of God.[64]

Further arguments may be drawn from the Vatican Council and the words the Pope uses in the act of canonization. A very valid

[61] Cf. Billot, *De Ecclesia Christi,* T. II, Thesis XVII, p. 97, nota 2.

[62] St. Thomas (*o. c.,* quodl. IX, art. 16, p. 218): " Dico ergo, quod judicium eorum qui praesunt Ecclesiae potest errare in quibuslibet si personae eorum tantum respiciantur. Si vero consideretur divina providentia quae Ecclesiam suam Spiritu sancto dirigit ut non erret, sicut ipse promisit, Joan. XVI, quod spiritus adveniens doceret omnem veritatem de necessariis scilicet ad salutem; certum est quod judicium Ecclesiae universalis errare in his quae ad fidem pertinent, impossibile est."

[63] St. Thomas (*l.c.*): " Utrum omnes Sancti qui sunt per Ecclesiam canonizati, sint in gloria, vel aliqui eorum in inferno."

[64] *L. c.:* " Quod Pontifex cuius est canonizare Sanctos, potest certificari de statu alicuius per inquisitionem vitae et attestationem miraculorum; et praecipue per instinctum Spiritus sancti, qui omnia scrutatur, etiam profunda Dei."

argument most certainly can be obtained from the teaching of the Vatican Council, which established the infallibility of the Pope in defining doctrines concerning faith and morals.[65]

We must admit, of course, that one cannot gather certitude immediately and directly from the words of the Vatican Council. It is evident, however, from the teaching of theologians what precisely pertains to faith and morals. That canonization refers to faith and morals cannot be disputed. It is concerned with faith, "for the honor we manifest to the Saints, is a form of profession of faith, whereby we recognize the glory of the Saints";[66] canonization also pertains to morals, for by canonization the Saints are proposed to the faithful as models to be emulated.

The Roman Pontiff declares what pertains to faith and morals. For the infallibility of the Pope extends to every doctrine referring to faith and morals whether they be revealed immediately or mediately.

The formulae employed by the Popes in their Bulls of canonization clearly show that this solemn act proceeds from the plenitude of their powers, and they also declare their intention to prescribe a certain form of worship for all the faithful in a definitive manner.

The formulae conceived by Benedict XIV reads as follows: "In honor of the Holy and individual Trinity, for the exaltation of faith and the extension of the Christian religion, in virtue of the authority of Our Lord Jesus Christ, the Blessed Apostles Peter and Paul, after mature deliberation, frequently imploring divine aid, and after consultation with Cardinals, Patriarchs, Archbishops and Bishops residing in Rome, we decree and define, that Blessed N. is a Saint, and that he is to be inscribed in the catalogue of Saints, ordaining that he should be piously commemorated by the universal Church annually on his birthday. In the name of the Father and of the

[65] Conc. Vatican., (Sess. IV, c. IV, *de Romani Pontificis infallibili magisterio*): "Romanus Pontifex, cum ex cathedra loquitur, ea infallibilitate pollet, qua divinus Redemptor Ecclesiam suam in definienda doctrina de fide vel moribus instructam esse voluit; ideoque eiusmodi Romani Pontificis definitiones ex sese, non autem ex consensu Ecclesiae, sunt irreformabiles." Cf. Denzinger-Bannwart, *Enchiridion Symbolorum*, (Friburgi Brisgoviae, 1928), n. 1839.

[66] St. Thomas, (*l. c.*): "Honor enim, quem Sanctis exhibemus, quaedam professio fidei est, qua sanctorum gloriam credimus."

Son and of the Holy Spirit. Amen." [67] Similar words are employed by the Roman Pontiffs whenever they propose a truth which is to be firmly believed by the faithful. The Church could not bind them in this manner, that is, to believe absolutely that those who are canonized are among the Saints, unless she had decreed so infallibly.

Benedict XV (1914-1922), in his canonization (1920) of St. Margaret Mary Alacoque (1647-1690), has this formula: "Having considered everything that was necessary, in virtue of certain knowledge and the plenitude of our Apostolic authority, we confirm and corroborate all the foregoing, and again establish and proclaim to the universal Church".[68] Pius XI (1922-1939), decreeing (1925) the canonization of St. Thérèse of the Child Jesus,[69] and Pius XII (1939-), in the canonization (1943) of St. Margaret, O.P., daughter of Bela IV, King of Hungary, use almost identical expressions.[70]

The Popes resort to such serious words to indicate clearly the difference between beatification and canonization.

Furthermore, the Roman Pontiff expressly states that he wishes to have recourse to his infallible authority.[71]

[67] Benedict XIV, (*o.c.*, lib. I, cap. 36, n. 21): "Ad honorem Sanctae et individuae Trinitatis, ad exaltationem fidei et christianae religionis augmentum, auctoritate D.N. Jesu Christi, BB. Apostolorum Petri et Pauli, ac nostra, matura deliberatione praehabita et divina ope saepius implorata, ac de venerabilium fratrum nostrorum S.R.E. Cardinalium, Patriarcharum, Archiepiscoporum et Episcoporum in urbe existentium consilio, Beatum N. Sanctum esse decernimus et definimus, ac Sanctorum catalogo adscribimus, statuentes ab Ecclesia Universali illius memoriam quolibet anno die eius natali... pia devotione recoli debere. In nomine Patris et Filii et Spiritus Sancti. Amen."

[68] *Acta Apostolicae Sedis*, (XII [1920], 512): "Perpensis omnibus, quae erant inspicienda, ex certa scientia ac Apostolicae Auctoritatis plenitudine, cuncta praedicta et eorum singula confirmamus, roboramus atque iterum statuimus, universaeque Ecclesiae denunciamus."

[69] *AAS*, (XVII [1925], 337): "Haec omnia certa scientia et Apostolicae protestatis plenitudine confirmamus, roboramus atque iterum statuimus, decernimus universaeque Catholicae Ecclesiae denunciamus." Pius XI uses the same formulae in subsequent canonizations. Cf. *AAS*, XVII (1925), 419, 465, 482.

[70] *AAS*, (XXXVI [1944], 39): "Omnibus itaque quae inspicienda erant, bene perpensis, certa scientia, Apostolicae Auctoritatis Nostrae plenitudine, omnia et singula quae supra diximus confirmamus, roboramus, denuo statuimus ac praecipimus, universaeque catholicae Ecclesiae denunciamus."

[71] Cf. *AAS*, XXV (1933), 139; *AAS*, XVII (1925), 401.

Another question of importance concerns the object of the infallible judgment of the Pope in the decree of canonization. Does the Pope intend by this decree to declare merely that a servant of God is in heaven, or also that the latter is endowed with a special sanctity, that is, that he has exercised heroic virtue? Becoardi, S.J., says that he has never met with a discussion of this question.[72] According to his view nothing else is defined in the act of canonization than that a canonized person is in heaven. He is led to this conclusion by the formulae used in the canonization where no mention is made about heroic virtues. Then he adds that sanctity does not necessarily include the exercise of heroic virtues, for even one who has never exercised heroic virtue, could by one transient act, by which he has sacrificed his life for Christ, that is, by martyrdom, be considered a Saint.[73]

We must remember, however, that heroic virtues and martydom, confirmed by miracles, are the motive and the reason why the Pope inserts a person in the catalogue of Saints. Hence, we maintain that the infallibility also refers to that motive which induces the Pope to canonize a servant of God, for in the recent formulae resorted to by Benedict XV, Pius XI, and Pius XII, evident statements are made to this effect, namely, the words "haec omnia" ("all the foregoing"), viz., that the servant of God exercised heroic virtues in his life or suffered martyrdom for his faith, "in virtue of certain knowledge and the plenitude of Apostolic power we *confirm, corroborate,*" etc.[74]

The infallible judgment is not concerned merely with human facts indicated in the Bull of canonization, but with divine facts, as the practice of heroic virtues, or the martyrdom sustained for the Catholic faith.

It should be noted that by the decree of canonization the Roman Pontiff wishes that liturgical veneration be rendered to a servant of God, and that the latter be invoked as an advocate and intercessor, which is quite patent from the formulae of canonization. Pius XI

[72] Cf. *Catholic Encyclopedia,* Vol. II, page 367.

[73] *L. c.:* "...sanctity does not necessarily imply the exercises of heroic virtue, since one who had not hitherto practised heroic virtue would, by one transient heroic act in which he yielded up his life for Christ, have justly deserved to be considered a saint."

[74] Cf. *AAS,* XVII (1925), 337.

in the canonization of St. Thérèse of the Child Jesus presents her as an example to be imitated.[75] In the canonization (1933) of St. Andrew Hubert Fournet he says: "All are invited by Apostolic authority to imitate and venerate him".[76]

No obligation is imposed upon all to invoke each and every Saint; but it is ordered that the servant of God be held as a Saint deserving of veneration.

As to the quality of assent required on the part of the faithful, many theologians held that the infallibility of the Pope in the decree of canonization is a matter of divine faith[77]. According to Suarez to decline assent altogether would be impious and rash[78]. Pesch is of the opinion that it is of ecclesiastical faith, since it rests on the testimony of the Church[79].

The infallibility we have thus discussed is not of immediate divine faith, for there is no direct and immediate revelation, but of mediate and consequent faith. The Roman Pontiff derives absolute certitude from indirect and mediate revelation, namely, from the miracles, for these manifest the will of God. This view, if rightly understood, agrees with the doctrine of the Church. The term "revelation" may be equivocal, and hence should not be used here, unless it be in a wide sense. In canonization our attention should be directed to two elements: one human, the other divine: the human, i. e., all that pertains to the historical facts, their investigation and their confirmation; the divine element, namely, after due investigation has been made into the life and virtues of a servant of God, divine assistance is enlisted for an absolute judgment, for the Pope intends to and actually does use his supreme power.

Although a Catholic would not be looked upon as a formal heretic if he were to impugn a decree of canonization (for he would not deviate from immediate divine, Catholic faith), nevertheless, he must submit to it with internal assent, otherwise he would be acting temerariously in view of the infallible pronouncement.

[75] *L. c.:* "...exemplum Ecclesiae filiis carissimis ad imitandum proposuit."

[76] Cf. *AAS,* (XXV [1933], 139): "Ad eum imitandum colendumque Apostolica auctoritate invitentur omnes."

[77] Cf. Benedict XIV, *o.c.,* lib. I, cap. 45, nn. 2-22.

[78] Suarez, *o.c.,* Disp. V, Sect. VIII, n. 8.

[79] Pesch, *o. c.,* Tom. I, Prop. 51, n. 553.

To sum up then. From the time of Urban VIII (1623-1644) all theologians and canonists have taught that canonization is proper to the Pope exclusively. The Decretalists advanced various reasons in this regard. First of all, canonization pertains to major causes, which should be referred exclusively to the Holy See; moreover, the miracles that are implored of God to confirm the sanctity of some servant of God, have reference to matters of faith, and the final decision respecting questions of faith is reserved to the Pope. Furthermore, since canonization is a decision whereby the veneration of a servant of God is imposed upon the universal Church, and since the Pope is the head of the Church, it necessarily follows that canonization belongs to him alone [80]. Augustus Triumphus offers an apposite reason when he says that "just as it belongs to Christ to sanctify men, and to make Saints, according to the words of Leviticus 'I am a holy God, who sanctifies you,' in like manner it belongs to the Pope alone, who is the vicar of Christ, to manifest and approve the sanctity of men. And just as the Pope is the head of the whole Church, it is his office to order the members of the Church to venerate someone as a Saint" [81].

The charisma of infallibility which the Pope enjoys is personal and incommunicable. Therefore, he is competent, either alone, or in conjunction with an Ecumenical Council. Consequently, the Pope may commit the preparation of the acts, etc., to Bishops, but the final act, that is the definitive sentence, must emanate from the Roman Pontiff, expressed in a Bull of Canonization.

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[80] Cf. Joannes Andreae, *o.c.*, tit. 45, cap. 1, n. 5; Antonius a Butrio, *In Librum Tertium Decretalium Commentarii*, tit. 45, cap. 1, n. 7; Fagnanus, *o.c., ibid.*, n. 27; Innocent IV, *o.c., ibid.*, n. 2; Barbosa, *o.c.*, T. II, tit. 45, n. 3; Pirhing, *Jus Canonicum*, (Venetiis, 1759), Lib. III, tit. 45, cap. 1, n. 3, and others.

[81] Augustus Triumphus (*o.c.*, q. 14, art. 1, *in corp.*): "Quia sicut solius Christi est homines sanctificare, et sanctos facere, iuxta illud Levit. XIX, 2, 'Ego sanctus sum Deus, qui sanctifico vos': ita est solius Papae, qui vicarius est Christi, hominum sanctitatem manifestare, et approbare. Similiter sicut solus Papa est caput totius Ecclesiae, ita ad ipsum spectat membris Ecclesiae mandare, ut aliquem colant ut Sanctum."

EX-SEMINARIAN AND NOVICE: A CLARIFICATION

A case entitled " Ex-seminarian and Novice " was discussed in The Jurist, issue of October 1942.[1] The difficulties raised there proceeded from the fact that the Sacred Congregation of Religious and the Sacred Congregation of Studies and Universities had issued a decree [2] in virtue of which recourse to the Holy See is required before a student of a seminary may be ascribed to a religious family. Without in any way questioning the juridic logic of the statements made in the solution of the case, it is our purpose to share with the reader some very illuminating declarations made by the late Cardinal La Puma, Prefect of the Sacred Congregation of Religious at the time the decree was issued. The declarations were printed in the *Commentarium pro Religiosis*,[3] unfortunately not available at present.

According to reliable information, the following are the conclusions of the annotations of His Eminence:

1.—The joint decree of the Sacred Congregations is not a decree in the strict sense of the term and constitutes no impediment of admission to a religious community. Its purpose it to establish the duty of obtaining the advice of the proper Sacred Congregation in certain cases before the candidate is allowed to embrace a life of perfection in a religious Institute. The freedom of the prospective religious is to be favored in every case, and, hence the decree is to be strictly interpreted.

2.—There is no relationship between the joint decree and canons 1363, 544 and 542, 2°. Obviously, then, the Sacred Congregation never meant to give the Ordinaries any new faculty whereby they might hinder the entrance into a religious community of a student in a seminary.

3.—The term " seminary " is to be strictly interpreted, and, consequently, a school to which cleric and lay students are indiscriminately admitted, does not fall under the meaning of that term as it appears in the decree. Likewise the term " religion " or " religious community " applies only to true communities in the canon-

[1] II (1942), 380-382.

[2] Cf. *AAS*, XXXIII (1941), 371; The Jurist, II (1942), 61.

[3] XXIII 1942), 226.

ical sense. Hence, societies whose members imitate the manner of life of religious by living in community under the government of superiors according to approved constitutions, but without public vows or with no vows at all, are not included in the decree.

4.—Consequently, the joint decree covers the case of admission into seminaries of applicants who were, in the canonical sense, postulants, novices or professed in a religious community, but does not include students coming from boarding or day schools conducted by religious, or even from their junior seminaries, the so-called apostolic schools.

5.—Although one reads in the decree that "before a person who has for any reason left a seminary, is ascribed to a religious family, the religious superior must have recourse to the Sacred Congregation of Religious", these words do not concern a) those who leave a seminary or college in order to embrace the religious life; b) those who after having finished their studies leave the seminary to wait for the time of ordination; c) those who through a legitimate and just cause, e. g. to pursue special studies, interrupt their course of ecclesiastical studies; d) those who must leave the seminary to comply with compulsory military service.

6.—Those ex-seminarians who definitely fall under the restrictions of the joint decree may be admitted in an apostolic school without recourse to the Sacred Congregation; they cannot, however, be thus admitted to the noviciate.

7.—Persons who desire to join a community of brothers or a clerical community as lay brothers are in no way affected by the decree.

8.—The decree is prospective in effect and does not retroact. Hence, recourse is not required in the case of students who left the seminary on or before November 25, 1941, that is, before three months had elapsed from the promulgation of the decree in the *Acta Apostolicae Sedis*.

9.—Recourse to the Sacred Congregation of Religious must include the following documents signed by the rector of the seminary in which the candidate for the religious life resided: a) a statement regarding the moral and intellectual qualifications of the applicant; b) a transcript of the marks he obtained in each one of his studies; c) the rector's declaration regarding the candidate's inclination to

the religious life; d) a statement of the manner and causes which moved him to leave the seminary.

This interpretation of the joint decree was later sanctioned by the reply of the Sacred Congregation of Religious to an inquiry of the Superior General of the Franciscan Fathers:

"Haec Sacra Congregatio, mature perpenso dubio circa applicationem Decreti S. Congregationis de Religiosis et Seminariorum diei 25 Julii 1941, rescribendum censuit prout rescribit.

Decretum non respicere eos qui e Seminario vel Collegio exeant ad amplectendam vitam perfectionis religiosae in aliquo Instituto Religioso, de quibus satis provisum in c. 544, par 3.

SS.mus D. Noster supradictam responsionem approbavit in Audientia habita ab Emo. Card. Praefecto die 11 Maii 1942.

Haec a me communicanda erant cum Paternitate Tua, cui interim omnia fausta adprecor a Domino.

Paternitati Tuae add.mus in Christo."

Fr. L. H. Passetto, Secr.

Romae, 25 Junii 1942.

Bouscaren mentions [4] a similar response given to the Society of Jesus on May 11, 1942.

For a while it was expected that the Sacred Congregation of Studies and Universities would issue another declaration, but to this date no report of such document has been received.

Basil M. Frison, C.M.F.

Claretian Major Seminary
Compton, Calif.

NEWS STORY IN *THE NEW YORK TIMES* REPORTING THE VII PROVINCIAL COUNCIL OF BALTIMORE (1849)

The Great Council of the Roman Catholic Bishops. — In order that the public may form some idea of the prelates who constitute the Council of Catholic Bishops, to assemble at the Cathedral, in this city, (says the Baltimore Sun) on Sunday, we give the following list of their names, places of birth, etc., furnished by a correspondent of the New York Herald:

[4] *The Canon Law Digest,* II (Milwaukee: Bruce, 1944), 166.

1. Right Rev. John B. Fitzpatrick, Bishop of Boston, is a native of Massachusetts, of a fine, commanding appearance, highly educated and talented. This prelate is exceedingly popular with his clergy, and is famed for his goodness and hospitality.

2. Right Rev. William Tyler, Bishop of Hartford, is a native of Connecticut, and a convert to the Catholic church. He is a very pious and holy Bishop, without guile.

3. Right Rev. John McCloskey, Bishop of Albany, was born in Brooklyn, and was, until within a short time, coadjutor Bishop of this Diocese. He left behind him, in New York, many warm and devoted friends, both among clergy and laity, who remembered with pleasure his many amiable qualities.—Bishop McCloskey is a forcible and pleasing speaker, gentlemanly and courteous in his manners, a sound theologian, well educated, zealous in the discharge of his onerous duties, and a firm and unwavering friend.

4. Right Rev. John Timon, first Bishop of Buffalo, a native, we believe, of Pennsylvania. He is, to our mind, one of the most zealous, indefatigable and self-sacrificing men in the Catholic church, without a particle of ambition, having heretofore refused the mitre more than once, and would now be, had he not refused to accept, Archbishop of St. Louis. He was for many years Superior of the Lazarists in this country. The amount of good done by him in Illinois, Missouri and Indiana, is incalculable. It may be truly said, he is like the Bishops in the early ages of the church, without wealth, or the desire of it. Buffalo is beginning to show the fruits of his zeal, piety, and self-denying sacrifices.

5. Right Rev. John Hughes, Bishop of this diocese, is well known to all our readers.

6. Right Rev. Francis Patrick Kenrick, Bishop of Philadelphia, is, in all respects, at the head of the American church. As a theologian, he is immeasurably superior to any Bishop in the United States; his " Dogmatic and Moral Theology " are the text books in nearly all the ecclesiastical seminaries in this country, and in very many in Europe. Lately he has become one of the most popular Bishops in these United States.

7. Most Rev. Samuel Eccleston, Archbishop of Baltimore, was born in Kent Co., on the Eastern Shore of Maryland. His great-grandfather, Sir John Eccleston, was an English nobleman, who emigrated to Maryland nearly a hundred years ago; his brother,

Hon. John B. Eccleston, is one of the most distinguished judges on the Maryland bench; he is an Episcopalian, and generally represents them in their general conventions. Archbishop Eccleston is a convert to the Catholic faith; he was for many years President of St. Mary's College, Baltimore; he is a man of remarkably sound judgment, dignified, eloquent, learned, a good theologian, and a republican in every thought and feeling.

8. Right Rev. Dr. O'Connor, Bishop of Pittsburgh. Of this prelate we know but little; he was educated in Rome, and of course must be learned.

9. Right Rev. Richard V. Whelan, Bishop of Richmond, is a native of Baltimore, of a respectable family; he is a most kind, amiable and industrious prelate.

10. Right Rev. Ignatius A. Reynolds, Bishop of Charleston, born in Kentucky, is a man of great talent, possesses eloquence of a very high order, a learned man, a good theologian, a man of excellent heart, every way worthy to succeed the lamented Bishop England.

11. Right Rev. Michael Porter,[11] Bishop of Mobile, a native of La Belle France; a gentleman of the old school; learned, dignified, and highly qualified to govern.

12. Right Rev. Anthony Blane,[12] Bishop of New Orleans, born in France; a man of great firmness, good judgment, and well qualified to govern this ancient and important see.

13. Right Rev. John J. Chance,[13] Bishop of Natchez, a native of the city of Baltimore; a fine specimen of the American gentleman; polite, accomplished, learned, eloquent; a zealous champion of his own church, without a particle of intolerance towards others. This prelate reminds us much of Bishop McCloskey. He has the same gentle, moving eloquence—the same mild, amiable disposition, endearing him to all who have the pleasure of his acquaintance. Like Bishop McCloskey, he is almost adored by his clergy.

14. Right Rev. Andrew Byrne, Bishop of Little Rock, a native of Ireland; a laborious missionary, well known in this city for his goodness of heart, untiring industry and great charity. He undergoes, we have no doubt, great privations in his frontier diocese.

[11] This is Bishop Portier.

[12] This is Bishop Blanc.

[13] This is Bishop Chanche.

15. Most Rev. Peter Richard Kendrick, Archbishop of St. Louis, a native of Ireland. He is a brother of the Bishop of Philadelphia. He does not possess either the talent or learning of his brother. He is the author of one or two works; the principal one, "Anglica Ordinations," is creditable to him.[15] His other works do not come up to our expectations.

16. Right Rev. Dr. Loras, Bishop of Dubuque, born in France; a gentleman and a scholar; zealous and indefatigable; sincere, and much beloved by all who know him.

17. Right Rev. Martin J. Spalding, coadjutor Bishop and Administrator of Louisville.—Bishop Spalding's family were originally from Maryland, and were most respectable. They emigrated many years ago to Kentucky, where the Bishop was born. Bishop Spalding was formerly one of the editors of the "United States Catholic Magazine," and author of many able reviews, which appeared in that work. His review of "d'Aubigne's History of the Reformation," published four or five years ago, stamps him as a man of great industry, sound judgment, powerful argument, and of varied and extensive acquirements. His style is clear and concise. We look upon him as second only to Bishop Kenrick in the American hierarchy. He is always ready and able to defend his venerable church, whether it be in the pulpit or by his pen. Bishop Spalding is an honor to his church and a worthy son of old Kentucky—the mother of so many great men.

18. Right Rev. John B. Purcell, Bishop of Cincinnati, born in Ireland; he came to this country young; went to Emmetsburg,[18] and was, we believe, in the class with Bishop Hughes. He is a man of very superior abilities, highly educated, a splendid classical scholar, and fine linguist. In polemics his controversy with Campbell takes a high rank.

19. Right Rev. Richard P. Miles, Bishop of Nashville, born in Maryland, was a Dominican; he is a most laborious, zealous, hard-working prelate, riding on horseback over his immense Diocese, often camping out at night far from any human habitation, undergoing hardships and privations that many modern missionaries would sink under.—Bishop Miles is universally respected and beloved in Nashville.

[15] This is Bishop P. R. Kenrick. "Anglica[n] Ordinations" is meant to be the title of the book.

[18] Emmitsburg is meant.

20. Right Rev. James Vandevelde, Bishop of Chicago, born in Belgium; has been in this country a great many years; was educated at Georgetown College, and has been at the head of the Society of Jesus in Missouri. Bishop V. is an untiring, indefatigable missionary, worthy to be, as he has been, the companion of the good Father De Smet, who succeeds him in Missouri. His diocese is one of the most important in the United States, and is rapidly filling up.

21. Right Rev. J. M. Henni, Bishop of Milwaukee, born in Germany; a gentle, polite, learned and accomplished prelate, well fitted to govern his almost border diocese.

22. Right Rev. Peter Paul Le Fevre, coadjutor and administrator of Detroit, born in Belgium; he has governed his diocese with mildness, kindness, and firmness; the fruits to be seen in the great increase of clergy and laity.

23. Right Rev. Amedeus Rapp,[23] Bishop of Cleveland, a native of France. Of this prelate we know but little.

24. Right Rev. D. St. Palais, Bishop of Vincennes, a native of France; a most accomplished and polished gentleman.

25. Right Rev. J. M. Odin, Bishop of Galveston, is a native of France; he is a tried and faithful missionary Bishop.

26. Right Rev. Benedict Joseph Flaget, a native of France, Bishop of Louisville. This venerable prelate, the patriarch of the American Catholic Church, the cotemporary of Archbishop Carroll, of Bishop Brute and Dubois, must be nearly eighty years old. We well remember to have heard a venerable priest speak of his consecration in 1810 by Archbishop Carroll, and of the consecration sermon preached by the celebrated William Vincent Harold (now of Dublin, Ireland), who was one of the most eloquent and classical preachers in the church. With what delight must Bishop Flaget look at the number of bishops and priests of these U. States, compared with the handful of clergy and their scattered flocks at the time of his consecration, now almost forty years ago.

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[23] This is Bishop Amadeus Rappe.

Decrees and Decisions

CANONICAL

APOSTOLIC DELEGATION
UNITED STATES OF AMERICA

No. 472/41

MAY 17, 1946

Your Excellency:

His Eminence the Cardinal Prefect of the Sacred Congregation on the Discipline of the Sacraments writes me that he submitted to the consideration of the Holy Father the petition of the Episcopate of this country for the faculty to dispense from the Eucharistic fast *ad modum potus et medicinae* the faithful who are hospitalized during their illness.

His Holiness, in the audience of March 25, 1946, graciously deigned to grant *ad triennium* to all the Most Reverend Ordinaries of the United States the faculty to grant dispensations from the Eucharistic fast *per modum potus et medicinae pro infirmis in nosocomiis degentibus, durante tantum male affecta valetudine, remota quavis scandali vel fidelium admirationis occasione.* This faculty, as I need not add, may not be invoked in favor of priests for the celebration of holy Mass, but only for the reception of holy Communion.

The relative tax due to the Sacred Congregation for this grant is five dollars which may be made payable to the Apostolic Delegation who will report it to the Sacred Congregation.

With cordial regards and best wishes, I remain,

Yours very sincerely in Christ,

✠ A. G. CICOGNANI
Archbishop of Laodicea
Apostolic Delegate

APOSTOLIC DELEGATION
UNITED STATES OF AMERICA

No. 153/46

MAY 19, 1946

Your Excellency:

In the *Index Facultatum Quinquennalium* with which the Holy See grants the faculty to the Most Reverend Ordinaries of this country to dispense from the impediment *disparitatis cultus* the cases in which there is question of marriage with a Jewish or a Mohammedan person, are excluded from the Most Reverend Ordinaries' faculty to dispense. This limited faculty may be found in the third paragraph of the faculties committed to the Most Reverend Ordinaries by the Supreme Sacred Congregation of the Holy Office.

Now I am instructed to inform the Most Reverend Ordinaries that, in an audience granted on April 12, 1945, the Holy Father, accepting the petition of the same Supreme Sacred Congregation, ordered that the restrictive clause in the aforesaid faculty be suppressed in regard to the marriages to be celebrated with a Jewish person, but that it remain in effect for marriages to be celebrated with Mohammedans.

This change will go into effect on July 1, 1946. From that date, therefore, you will be empowered to grant dispensations, in virtue of your quinquennial faculties, from the impediment *disparitatis cultus* when the non-Catholic party is Jewish, saving the special precautions which should be taken in all such cases.

I avail myself of the occasion to extend to you very best wishes; and I remain,

Yours very sincerely in Christ,

✠ A. G. CICOGNANI
Archbishop of Laodicea
Apostolic Delegate

A decree of the Sacred Congregation of Rites approves two miracles proposed in the Cause of the Canonization of Blessed Catherine Laboure, of the Congregation of Charity of St. Vincent de Paul. A decree of the same Sacred Congregation declares that all is in readiness for the beatification of the Venerable Maria Teresa Verzeri, foundress of the Institute of the Daughters of the Most Sacred Heart of Jesus.

* * * * *

SECULAR

PUBLIC BENEFIT AND SCHOOL BUS TRANSPORTATION

The lively question of State aid to non-public schools has now assumed national significance as a result of the action of the Supreme Court of the United States in assuming jurisdiction of the appeal from a New Jersey Decision upholding the constitutionality of the State statute extending the benefits of school bus transportation to parochial school pupils. In the words of the highest Court of New Jersey, the transportation of children attending non-public schools is " a public matter, and moneys expended therefor, except those prohibited by the Constitution of this State, do not constitute the expenditure of public monies for a private purpose." [1]

To hold otherwise would penalize children because of the nature of the institution which their parents in the exercise of their constitutional prerogatives have chosen as the most suitable school for the complete education of their children. The Supreme Court of the United States in the Oregon School case [2] has confirmed this right of election and has expanded on it in the case of *Cochran* v. *Louisiana State Board of Education*,[3] wherein the Court declared that textbooks could be constitutionally furnished to children attending parochial schools.

These decisions, taken in conjunction with the compulsory education laws of the States and the acknowledged traffic hazards

[1] *Everson* v. *Board of Education* (1945), 44 A. (2) 333.

[2] *Pierce* v. *Hill Military Academy*, 268 U. S. 510; *Pierce* v. *Society of the Holy Names of Jesus and Mary* (1924), 268 U. S. 510.

[3] 281 U. S. 370.

to children walking along the highways, not only sustain the proposition that extension of free transportation to parochial school children is a public purpose, but, further, that it is a public duty. The legal compulsion directed against the parents by the compulsory education laws so that the State may secure the benefits of a healthy and educated citizenry entails the governmental responsibility of affording parents the opportunity of safely adhering to the statute designed to promote universal education. Wisely and justly the New Jersey Court declined to frustrate the growing desire of the people to assume this responsibility in return for the manifold benefits flowing therefrom. Recognition was given to the fact that such transportation legislation is a natural and necessary corollary of a compulsory education statute. These statutes were enacted many years ago when traffic hazards were at a minimum. Today, however, the hazards are such that the State must make its school bus transportation statutes co-terminous with the compulsory education legislation. To hold otherwise would render nugatory the right recognized in the now famous Oregon School case, particularly in the case of children living in remote or highly congested districts.

The Court of Errors and Appeals of Kentucky in the case of *Nichols* v. *Henry*[4] fully developed the public benefit and responsibility doctrine advanced in the New Jersey case. Thus, the Court stated

> In this advanced and enlightened age, with all of the progress that has been made in the field of humane and social legislation, and with the hazards and dangers of the highway increased a thousandfold from what they formerly were, and with our compulsory school attendance laws applying to all children and being rigidly enforced, as they are, it cannot be said with any reason or consistency that tax legislation to provide our school children with safe transportation is not tax legislation for a public purpose. Neither can it be said that such legislation, or such taxation, is in aid of a church, or of a private, sectarian, or parochial school, nor that it is other than what it is designed and purports to be, as we have stated hereinabove—legislation for the health and safety of our children, the future citizens of our State. The fact that in a strained and technical sense the school might derive an indirect benefit from the enactment, is not sufficient to defeat the declared purpose and the practical and wholesome effect of the law.

This, indeed, is the most all-embracing judicial approbation of the fundamental reasons which have motivated the adoption of

[4] 191 S. W. (2) 930.

free school bus transportation statutes in the several States. The Court clearly recognizes the responsibility of the State to provide a safe means of transportation for children attending school under the compulsion of law. This recognition of the duty of the State to safeguard the child from the hazards and dangers of the highway, while implicit in the New Jersey Decision, was not formally discussed by the New Jersey Court; on the contrary, it emphasized the fact that free school bus transportation is a corollary of the compulsory education statutes. This proposition was, likewise, stressed by the Kentucky Court, but the main significance of the case lies in its emphasis on the duty of the State to provide a safe means of transportation to and from school. The constitutional basis of school bus transportation statutes is thus broadened—reliance may now be placed upon the general police powers of the State, as well as the compulsory education statutes.

Another important feature of the Kentucky Decision is the frank observation by the Court that the statute is not " in aid of a church or of a private, sectarian, or parochial school." The Court thereby passes directly upon an issue that is raised in every case involving legislation of this character. Too frequently, Courts by a narrow and strained construction of this point prevent the State from fulfilling its desire to assume the legal responsibility that it has to all school children. Nor does the Court fail to consider the proposition that in a strained sense a school " might derive an indirect benefit." It observes, however, that even if such be the case, this is not " sufficient to defeat the declared purpose and the practical and wholesome effect of the law."

The New Jersey and Kentucky Courts' judicial recognition of the constitutionality of the State's assumption of its responsibility to afford equal protection to all school children is particularly significant in that it reaffirms the right of parents with regard to the education of their children. Moreover, it involves a natural and logical development of the true democratic concept of the role of the Government in supplementing the efforts of the parents—a role which in this case is properly designated as " a public matter."

George E. Reed

Washington, D. C.

* * * * *

An early case involving the question of free transportation to parochial school children arose in Wisconsin in the case of *State* v. *Milquet* (1923).[1] A contract was entered into for the ostensible purpose of transporting public school children. Upon investigation, however, it was found that, of twenty-seven children carried, only two attended the public schools. The contract was declared void as in contravention of law. The fact that the presence of the two public school children would have made it necessary to contract for transportation, regardless of the number of other children carried, was considered irrelevant.

The refusal to recognize transportation as an aid to the child and not to the school was evident in the Delaware case of *State* v. *Bowen,* (1934).[2] There, in declaring that transportation was a direct aid to such schools, the Court observed:

> We are of the opinion that to furnish free transportation to pupils attending sectarian schools, is to aid the schools. It helps build up, strengthen and make successful the schools as organizations.

However, in the Maryland case of *Board of Education* v. *Wheat,* (1938),[3] transportation was deemed to be an aid in the enforcement of the compulsory attendance laws and any benefit derived by the schools was merely incidental. In discussing this aspect of the question, the Court said:

> School attendance is compulsory, and attendance at private or parochial schools is a compliance with the law... The danger of perversion to private purposes may be admitted, but the Legislature is primarily entrusted with the care of that, and the courts have no duty in relation to it unless and until a perversion should be obvious. The fact that the private schools including parochial schools, receive a benefit from it could not prevent the Legislature's performing the public function.
>
> This conclusion that the act must be regarded as one within the function of enforcing attendance at school, renders it unnecessary to consider separately the objection that a religious institution is aided... The institution must be considered as aided only incidentally, the aid only a by-product of proper legislative action.

[1] 192 N.W. 392.

[2] 172 A. 835.

[3] 199 A. 628.

In 1936, Section 206 of the New York Education Law was amended to provide for transportation of school children to both private and public schools. When this statute was attacked in *Judd* v. *Board of Education*,[4] the Court examined the theory that such aid was for the benefit of the child and not the school, and concluded:

> An argument that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of the Constitution but rather is in aid of their pupils, cannot be upheld. The argument is utterly without substance and ignores not only the spirit, purpose and intent of the constitutional provisions, but also their exact wording. There is no ambiguity. Aid or maintenance "directly or indirectly" to a school under the control or direction of any religious denomination is forbidden. Aid furnished "directly" would be that furnished in a direct line, both literally and figuratively, to the school itself, unmistakably earmarked, and without circumlocution or ambiguity. Aid furnished "indirectly" clearly embraces any contribution, to whomsoever made, circuitously, collaterally, disguised, or otherwise not as a straight, open and direct course for the open and avowed aid of the school, that may be to the benefit of the institution or promotional of its interests and purposes. Free transportation of pupils induces attendance at the school and so promotes the interests thereof.

To the contention that such a statute might be sustained as a valid exercise by the legislature of the police power of the state, the Court replied:

> [The contention] ... overlooks the consideration that even the police power must be exercised in harmony with the restriction imposed in the fundamental law ... In section 4 of article 9 of the State Constitution the sovereign will of the People is clearly expressed. It is the duty of the courts rigidly to enforce it and they may not circumvent it because of private notions of justice or personal inclinations.

Transportation was refused in Oklahoma when the Court held that a constitutional provision that no public money or property should be used for any sect, church, denomination of system of religion "prohibited the use of public money or property for sectarian or parochial schools."[5]

That a statute providing for transportation for private school children might be sustained as a valid exercise by the legislature of

[4] 15 N.E. (2) 576.

[5] *Gurney* v. *Ferguson* (1941), 122 P. (2) 1002.

the police power of the state, was received with something less than sympathy by the Court in Washington in *Mitchell* v. *School District,* (1943).[6] Its answer was rather succinct:

> Police power cannot be exercised in contravention of plain and unambiguous constitutional inhibitions.

The question of the issue of free textbooks to private school children is another form of subsidy which has had a stormy career in the courts. In the Louisiana case of *Borden* v. *State Board of Education,*[7] the Court held valid a statute providing for the purchase of school books for the use of the school children of the state in either public or private schools. This decision was a rather close one, however, the Court splitting 4 to 3.

In *Cochran* v. *State Board of Education,*[8] another Louisiana case, a state judicial decision approving the giving of free textbooks to parochial school children was taken to the Supreme Court. The issue was whether taxation for the purpose of providing school books to private school children constituted a taking of private property for a private purpose. The Court, in affirming the decision of the court below, said:

> Viewing the statute as having the effect thus attributed to it we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.

As most of the states have laws prohibiting the use of public moneys or property for sectarian or parochial schools, it is upon the judicial interpretation of these statutes that the majority of textbook cases turn. One of the most interesting of such cases was brought in Mississippi.[9] In a learned opinion which displayed a breadth of vision unique for any section of the country, the Court declared itself unable to perceive any conflict between such aid and

[6] 135 P. (2) 79.

[7] 123 So. 655.

[8] 281 U. S. 370.

[9] *Chance* v. *Purchasing Board* (1941), 200 So. 711.

the statute in question. Its description of the duty of the state toward its school children is admirable:

> The political separation of church and state required by the Constitution does not indicate an incompatability between their respective manifestations, religion, and politics, but the state has the duty to respect the independent sovereignty of the Church, as such, and to exercise vigilance to discharge its obligation to those who, although subject to its control, are also objects of its bounty and care, and who regardless of any other affiliation are primarily wards of the state, and this constitutional barrier which protects each against invasion by the other must not be so high that the state in discharging its obligation as *parens patriae* can not surmount distinctions which, viewing the citizen as a component unit of the state, become irrelevant.

An appraisal of the judicial decisions on the subject of subsidy to private schools indicates that while headway has been made in securing such subsidies, there remains a firmly entrenched opposition whose arguments are founded upon the prohibitions, contained in many state constitutions, against any aid to religious schools.

One of the most interesting aspects of the subject is the manner in which states, heretofore considered as retarded in social legislation, such as Mississippi, have approved such subsidies, while states, such as New York and Delaware, which have attained a high degree of progress in humanitarian activities, have frowned upon such aid. A study of the subject is rewarding to the student even if only for the knowledge that Mississippi has something to teach New York.

E. R. Barry

Washington, D. C.

* * * * *

A three-judge panel of the California District Court of Appeals, sitting in Fresno, has upheld the constitutionality of a California statute authorizing the transportation of parochial school pupils as being " within the State's undoubted police power in that it is in aid of the education of the young and for the promotion of the public welfare."

* * * * *

Transportation facilities for parochial schools will be subjected to a referendum vote in Wisconsin in November.

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In Iowa an appeal is projected to contest before the Supreme Court the constitutionality of acts passed in 1945 in aid of school transportation.

* * * * *

Attorney General J. E. Taylor of the State of Missouri has ruled that the transportation of parochial school children by public school buses is constitutional in spite of the provision in the 1945 constitution forbidding the General Assembly and State subdivisions to allot funds in aid of any religious group.

* * * * *

Congress

A compromise draft agreed on by a conference committee of the Senate and House provides full participation in the school lunch program by all non-public schools. The bill has been signed by the President. It appropriates $10,000,000 each year to the Secretary of Agriculture, the sole administrator of the program, with which to purchase equipment for the storing, preparing and serving of food. It provides that in cases in which State law prohibits its officials from alloting funds for the program to non-public institutions, proportionate amounts of allotments made to such States will be withheld and issued directly by the Secretary of Agriculture to the non-public schools. Some 400,000 children in 2,290 parochial schools participate in the program.

* * * * *

The Education Department of the National Catholic Welfare Conference wrote Senator Allen J. Ellender of Louisiana, Chairman of the Senate Subcommittee considering two amendments to the Lanham Act proposed by Senator James M. Mead of New York one of which would authorize the Federal Works Administration to make loans and grants under a quarter million dollars for building class rooms and dormitories, while the other amendment would authorize the acquisition of buildings no longer needed by Federal agencies for transfer to schools for educational purposes. The Education Department is strongly in favor of permanent buildings, calling the erection of temporary structures a waste of money.

* * * * *

A revised draft of the Hill bill has been reported out of the Senate's Education and Labor Committee without elimination of

discrimination against non-public schools in the allegation of Federal subsidies to education.

* * * * *

Representatives of three Catholic agencies testified on Senate Bill 1606, the compulsory health bill. The objections centered about the dictatorial powers given the Surgeon General at the expense of voluntary health agencies. Other sources of complaint were the fact that hospitals, doctors, and nurses would be agents of the government and thus placed in politics and the fact that a State might use Federal subsidy to develop a program of Planned Parenthood.

* * * * *

HR 5864, a bill introduced by Representative Christian A. Herter, provides for an amendment to the Census Act, exempting religious organizations from the threat of Federal prosecution in the event of their refusal to give the statistics sought by the Bureau of the Census.

* * * * *

Building Projects

The " stop construction " order of the National Housing Administration and of the Civilian Production Administration was at first held to apply to churches and church-related institutions, because only general health and safety building projects were at first exempted. This policy has now been corrected to include religious, charitable and educational institutions.

Conscientious Objectors

The Supreme Court of the United States held that an alien who will not bear arms may become a citizen of the United States, providing he be willing to serve in the army in some other capacity, thus reversing a position previously held over the last fifteen years, asserted in three distinct cases brought before it.

Surplus Chapels

The War Assets Administration has authorized the chiefs of chaplains of the Army and the Navy to pass on the applications for surplus chapels and surplus chapel equipment made for the Army and Navy during the war, first consideration to be given to their

use as shrines and memorials, and second consideration to their use as denominational houses of worship, the disposal price to be gauged by a salvage estimate. Field agents have instructions to advertise locally, putting these chapels and this equipment on sale and to notify the local churches. Application is to be made for specific chapels and to be filed with the disposal agency having charge of the specific chapel. The application is then forwarded to the office of the chief of chaplains.

American Zone of Occupation

Most Rev. Aloisius J. Muench, D.D., Bishop of Fargo, has been appointed official American representative to act as liaison between the Catholic Church in Germany and Military authorities in the American Zone of Occupation. Protestant and Jewish liaison officers are being appointed to serve in similar capacities.

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Catholic Bishops in the American Zone of Germany agreed to recall a pastoral letter that described the denazification of their country as a " nightmare " and Russian policies as " revolting procedures ". Withdrawal was requested by American military government officials on the ground that it would cause " resentment, unrest and possible riot."

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Catholic magazines are not being freely licensed by the Allied authorities in Germany. None are permitted to enter from outside.

United Nations

Rt. Rev. Msgr. Frederick G. Hochwalt, director of the Education Department of the National Catholic Welfare Conference, appearing before the Foreign Affairs Committee of the House of Representatives protested against the limiting to fifty delegates of the national commission, the advisory body in reference to national membership in the United Nations' Educational, Scientific, and Cultural Organization. He said, " If the State Department may handpick members of the national commission with whom it is to consult in the selection of delegates and in other administrative matters, there is reason to fear that voluntary organizations, especially in the field of education, may be excluded from any effective

voice in the UNESCO. It may be conceded that the organization of the national commission must be initiated by the State Department, but the functions of the commission should be conducted without any interference from any government agent not a member of the commission."

An amendment to the bill in which the House of Representatives authorized participation in the UNESCO, sponsored by Representative Joseph F. Ryter of Connecticut, and adopted on the floor of the House after it had been rejected in committee, directs the State Department to designate not more than fifty voluntary organizations and to select members of the commission from one of the two names submitted by each organization.

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Four Catholic organizations are represented at the sessions of the Security Council of the United Nations Organization: Prof. Ross Hoffman (the National Catholic Welfare Conference); Rt. Rev. Msgr. Philip J. Furlong (the National Catholic Educational Association); Dr. Elizabeth Lynskey (the Catholic Association for International Peace); and Mrs. Henry Mannix (the National Council of Catholic Women).

UNRRA

Dr. Marguerite T. Boylan acted as the representative of the Catholic Association for International Peace at the fourth meeting of the United Nations' Relief and Rehabilitation Administration.

Released Time

The decision of the Circuit Court upholding the legality of religious teaching to the Champaign, Illinois public schools, appealed to the State Supreme Court, was upheld as constitutional by that Court on May 21.

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A citizens' committee protesting against the action of the School Board of Easton, Pa., approving released time for religious instruction, plans a taxpayer's suit to test its constitutionality. Representatives of seven organizations with a membership of 15,000 joined the committee. They are: the Citizens' Political Action Committee, the Fair Employment Practices Commission, the Na-

tional Association for the Advancement of the Colored People, the CIO, the Central Labor Union, the Jewish Community Council, and the Civil Liberties Union.

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The South Carolina Bar Association approved at its annual meeting a recommendation advocating the enactment of appropriate legislation to permit divorce in that State, the only one in the United States in which divorce is not permitted, several previous attempts at repealing a constitutional prohibition of divorce having failed.

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Under a new Rhode Island law, the State Juvenile Court is given discretion in determining the religious affiliation of children in adoption cases in which it is impossible to learn the religion of the parents.

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Bills have been introduced into the New York Senate and Assembly making Good Friday a legal holiday and the first Monday in August a legal peace holiday. Opposition to the bills regarding Good Friday has been systematically voiced by the New York State Council of Churches (Protestant).

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The New Orleans Archdiocesan Council of Catholic Women is opposing a bill introduced into the Louisiana Legislature that would reduce from fourteen to twelve years the age of newsboys and others engaged in street trades. The Council also appeals for sufficient funds for adequate administration of the division of women and children of the Department of Labor.

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The board of tax appeals in Youngstown, Ohio, has denied exemption to church property on the ground that only a part of it is used for worship, while the remainder is used as a rectory, the latter not being entitled to exemption, and no authority justifying the divisibility of property based on its use. The ruling has been appealed to the State Supreme Court.

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The State Attorney General's Office, Austin, Texas, overruled claims for exemption from the one per-cent motor vehicle retail sales tax on a bus that was bought to carry Protestant church members to and from Sunday School and church.

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The Orphans' Court sitting in Philadelphia voided as unconstitutional a provision of a will which excluded any person of the Catholic Faith from sharing in the estate of the testatrix.

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Members of all political parties in the Quebec Legislative Assembly have endorsed a motion of Jacques Dumoulin, Liberal member for Montmorency, proposing that the Canadian Government establish a Canadian embassy at the Vatican.

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In an official letter, Most Rev. W. M. Duke, D.D., Archbishop of Vancouver, urged Catholic parents to ask for the exemption of their children from attendance at sex instructions in public schools, which the children are obliged to attend because of a lack of Catholic schools.

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Abolition of denominational schools as incompatible with the Socialist educational system was the demand made in a manifesto of the British Commonwealth Party, Left Wing political group, which also called for the removal of religious education from State schools, as well as communal worship. It objected to released time and the the access of clergymen to the school children during school hours. It protested also against the questioning of applicants for school posts regarding their religious views.

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Although several Catholics ran for election to the new Japanese Parliament, none was successful. Only five of one hundred and forty-two Communist candidates were elected. Of the four hundred and sixty-four members elected, seven are Buddhist priests and three are Shinto priests.

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Criticism by Catholic educators of the recommendations of the United States education mission in Japan is directed against the

following points: co-education, recommended from the primary level upwards; the choice of text books by local teachers rather than by a central board; the failure to provide for private schools and colleges.

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Eleven organizations embracing millions of Americans of Central and Eastern European descent have banded together in a united front against the infiltration of Communist and other anti-democratic influences endangering the American way of life. The groups represented are: the Greek Catholic Union of the United States of America and Canada, the Lithuanian American Council, the Polish American Congress, the Serbs' National Federation, the Slovak League of America, the Slovenian Catholic Union, the United Croatians of the United States of America and Canada, the Croatian Catholic Union, the Ukrainian National Association, the Providence Ukrainian Catholic Union, and the Hungarian Reformed Federation.

The European Struggle

The Synod of the Serbian Orthodox Church, meeting in Belgrade, has rejected the invitation to place itself under the jurisdiction of the Russian Orthodox Church as well as a proposal to issue a statement criticizing Vatican policies, especially in Central Europe, declaring that "mutual difficulties of the Roman Catholic and the Orthodox Churches in Yugoslavia have served to create mutual understanding."

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Radio Vatican relates that in Slovenia (Yugoslavia) sixty priests and seminarians have been shot during the past year, some of them even without the show of a trial.

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The sufferings of Croatian Catholics, faithful to the Holy See for many centuries, have not ceased with the war but continue under the Tito regime. The number of priests killed in Croatia in the war is set at two hundred. At least one Bishop, Most Rev. Joseph Carevic of Aristio was killed. These killings were due not to national or political hatred but to the hatred of religion. Crucifixes have been removed from the schools, the teaching of the catechism

has been prohibited, church property has been wantonly confiscated, and four hundred priests are detained in prison and in concentration camps.

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A joint pastoral of the Polish bishops asserts that Poland cannot become a Communist country and sets July 7 as a day of prayer on which a solemn Mass will be celebrated in all the churches, closing a triduum, and on which vows of loyalty and obedience to Mary will be made by all the people.

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In a lengthy report made by Foreign Minister, Jan Masaryk, to the Czecho-Slovakian Parliament, he said, "Our relations with the Vatican, with whom we have entered into diplomatic connections, are good, and I hope that they may deepen and quicken if the Vatican views with favor certain important needs of our state."

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Slovak Catholics applied to the National Front headquarters in Prague for permission to form a new political party, the Christian Democratic Party, based on the Papal Encyclicals. However, the organizers found it impossible to accept the conditions demanded by the National Front which included the recognition of the status quo in the field of education, i. e., the nationalization of parochial and religious schools. Catholic support was then thrown in some instances to the Democratic Party, but the Hierarchy forbade the clergy to stand for election on May 26 or to deliver pre-election speeches or to participate in any way in the elections.

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The Czecho-Slovak Ministry of the Interior, headed by the Communist, Vaclav Nosek, charged Rev. Tomislav Kolakovitch-Poglain with being a Jesuit priest of Croat birth sent by the Vatican to Prague in 1943 to obtain information and with being a ringleader in an alleged Slovak underground movement. The priest surrendered himself to disprove the charges. He is not a Jesuit but was actively engaged in organizing the youth movement in Slovakia.

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Most. Rev. Istvan Zadravetz, formerly chief of Hungarian army chaplains, has been sentenced to five and a half years' imprison-

ment on war crime charges based on an alleged address of March 22, 1944, urging Hungary to continue its fight against the Allied nations. He was also deprived of political rights for a period of ten years.

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A military tribunal sitting in Scutari, Albania, sentenced to death as victims of anti-Catholic persecution three priests whose innocence tortured clerics were unanimous in proclaiming, though they were charged with being organizers and directors of a terrorist fascist organization.

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Andrei A. Gromyko, UN Security Council representative, suggested that the Council meet on Good Friday, but was overruled after protests made by Dr. Pedro Leao Velloso, Brazil's delegate, supported by Edward R. Stettinius, delegate of the United States, Sir Alexander Cadogan, delegate of the United Kingdom, and Dr. Eelco N. Van Kleffens, delegate of The Netherlands.

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France rejected the Socialist-Communist supported Constitution for the Fourth Republic by a majority of more than a million votes out of nineteen million cast. The French Hierarchy had condemned it as failing to guarantee the essential principles of Catholic doctrine on the human person, the family, and society.

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By a vote of 321-222 the French Constituent Assembly refused to include freedom of instruction as one of the rights of man in the preamble of the new Constitution.

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Discrimination in Syria is reported as occurring under the new regime against Catholic religious orders and Catholic schools.

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Holland's Catholic People's Party won thirty-two seats in the Netherlands Parliament in the elections held May 18, thus leading the field. The Catholic party cast thirty per cent of the approximately five million votes cast.

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Chronicle

GENERAL

A series of fourteen postage stamps commemorating the fourth centenary of the opening of the Council of Trent has been issued by the Vatican.

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Joseph P. Walshe, Ireland's first Ambassador to the Holy See and the first diplomat of that rank in the Irish foreign service, succeeds Dr. Thomas Kiernan, who held the rank of Minister.

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To commemorate the seventy-fifth anniversary of the Metropolitan Museum of Art, through the good offices of His Eminence, Francis Cardinal Spellman, Archbishop of New York, the Vatican has lent for exhibition a statue of the Good Shepherd.

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Our Holy Father granted a private audience to ex-President Hoover on March 23, relative to the work of the United States Famine Emergency Committee, of which Mr. Hoover is Chairman.

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His Excellency, the Most Rev. Apostolic Delegate to the United States, attended the centennial celebration of the foundation of the Church on Maui, Hawaiian Islands, in the last week of April and the annual memorial service for Molokai's Father Damien on May 2.

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His Excellency, the Most Reverend Apostolic Delegate to the United States, celebrated a Pontifical Mass at the Shrine of the Immaculate Conception, Washington, D. C., on May 12, in commemoration of the centenary of the dedication of the United States to the Immaculate Conception. The Mass was the chief feature of the program of the Major Marian Congress held May 11-13.

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On May 14, His Eminence, Francis Cardinal Spellman observed the thirtieth anniversary of his ordination. On the same day he presided at a Pontifical Mass in St. Patrick's Cathedral marking the first centenary of the Sisters of Mercy in the Archdiocese of New York.

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His Eminence, Francis Cardinal Spellman, delivered the sermon at the eighth annual Solemn Memorial Mass in the amphitheater at Arlington National Cemetery on Sunday, May 26. The Mass was celebrated by Most Rev. William R. Arnold, D.D., Military Delegate.

Most Rev. Hugh L. Lamb, D.D., Auxiliary Bishop of Philadelphia, offered a Solemn Pontifical Mass in commemoration of the twenty-fifth anniversary of the elevation to the Cardinalate of His Eminence, Dennis Cardinal Dougherty, Archbishop of Philadelphia. His Eminence received a congratulatory letter from our Holy Father. Present at the ceremonies were Joseph P. Kennedy, former United States Ambassador to Great Britain; Governor Edward F. Martin of Pennsylvania; Mayor Bernard Samuel of Philadelphia; former Postmasters General Frank Walker and James A. Farley; and Mayor David Lawrence of Pittsburgh.

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At the age of 68, Cardinal Clemens August Count von Galen, Bishop of Munster, Westphalia, died as he was making preparations to attend a two-day joint meeting of the German Bishops scheduled for March 26.

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Enrico Cardinal Gasparri died May 21 after serving thirty-one years in the Papal diplomatic service and twenty-one years as a Cardinal in various capacities with the Roman Curia.

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Bernard Cardinal Griffin addressed the convocation of the faculties of Fordham University on May 11, as a feature of the celebration of the first centenary of the granting of the University's Charter. On the same day, the degree of Doctor of Laws was conferred by the University on the President of the United States.

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His Eminence, Thomas Cardinal Tien has been transferred from the Vicariate Apostolic of Tsingtao and the Titular See of Ruspe to the new Archdiocese of Peiping as the first Archbishop of China's new national hierarchy, which, by a decree of April 11, is to consist of twenty archdioceses and seventy-nine suffragan sees. Thirty-eight prefectures apostolic remain in mission status. The Catholic population is four million.

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The Bishops' War Emergency and Relief Committee reported shortly before Laetare Sunday that in the five campaigns conducted by it since its establishment in 1941 it had received from the Catholics of the United States more than six million dollars. Operating in 44 nations, it has already distributed some fifty-four million dollars' worth of relief supplies.

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Most Rev. John Mark Gannon, D.D., Bishop of Erie, Treasurer of the Bishops' War Emergency and Relief Committee, declares that the total contributions to the nation-wide Laetare Sunday appeal will exceed two million dollars.

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Most Rev. John T. McNicholas, O.P., S.T.M., Archbishop of Cincinnati, was re-elected President General of the National Catholic Educational Asso-

ciation at its forty-third annual convention held in St. Louis, April 23, 24. The convention went on record as approving federal aid to education in places where needed provided that it be given to public and non-public schools without discrimination. It also endorsed the entry of the United States into the United Nations' Educational, Scientific, and Cultural Organization.

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A Regional Meeting of the Canon Law Society of America was held, at the invitation of His Excellency, Most Rev. Richard J. Cushing, D.D., at St. John's Seminary, Brighton. Papers were read by Rev. Otis F. Kelly, M.D., formerly psychiatrist at Danvers State Hospital, who dealt with the influence of abnormal mental states on matrimonial consent, and Rt. Rev. Msgr. Eric F. MacKenzie, S.T.D., J.C.D., Officialis of the Archdiocese of Boston, who reviewed decisions of the Sacred Roman Rota in cases involving insanity.

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The twenty-seventh annual meeting of the Franciscan Educational Conference was held June 17-19 at Carey, Ohio.

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April 12-13 were observed by the eighth annual conference on Eastern Rites and Liturgies, sponsored by Fordham University.

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The thirty-first annual convention of the Catholic Hospital Association of the United States and Canada met in Milwaukee, June 9-13.

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Dr. George N. Shuster, President of Hunter College, gave one of the principal addresses at the third biennial convention of the National Council of Catholic Nurses held in Toledo, May 24-26, under the auspices of Most Rev. Karl J. Alter, D.D., Bishop of that Diocese.

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On April 22, 23, the Catholic Association for International Peace held its annual meeting in Hartford at the invitation of Most Rev. Henry J. O'Brien, D.D., Bishop of that Diocese. Speakers were: Dr. George N. Shuster, Dr. Carlton J. H. Hayes, Gov. Raymond Baldwin of Connecticut, and Rev. Wilfrid Parsons, S.J.

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The second Inter-American Assembly of Pax Romana, meeting in Lima, Peru, was attended by three delegates from the United States and four from Canada.

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At the close of the Meeting of the National Catholic Music Educators' Association, held in conjunction with the twenty-ninth meeting of the Music Educators' National Conference, a solemn Pontifical Mass was celebrated in St. John's Cathedral by Most Rev. Edward F. Hoban, D.D., Bishop of Cleveland.

The eleventh National Catholic Laymen's Retreat Conference was held in Boston June 21-23 at the invitation of Most Rev. Richard J. Cushing, D.D., Archbishop of Boston.

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Roscoe Pound, Dean-Emeritus of the Harvard Law School, delivered a series of lectures, May 10, 11, 17, and 18, at Notre Dame University.

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A thirty-four story State Office Building in Albany has been dedicated to the late Governor Smith, the dedication being preceded by the firing of a nineteen-gun salute by a howitzer battery from West Point.

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On May 25-28 ceremonies were conducted in observance of the first centenary of the Old Cathedral of St. Peter in Chains, Cincinnati.

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The seventh centenary of the institution of the Feast of Corpus Christi, first observed in the Diocese of Liege in 1246, was observed in that Diocese with a fifteen-day religious celebration extending from June 16 to June 30.

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Miss Grace Moore, opera singer, has announced her intention of entering the Catholic Church.

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Most Rev. Stefan Uzdoczy-Zadraveta, retired from office since 1928, has been imprisoned as a war criminal by the Red-controlled Hungarian government because of his strong anti-Communist attitude.

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Gen. Umberto Nobile resigned from the Papal Academy of Science.

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Most Rev. Patrick Morrisroe, for thirty-five years Bishop of Achonry in the west of Ireland, died at the age of 77.

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Leonida Tonelli, member of the Pontifical Academy and professor of mathematics at the University of Pisa, has died in Asciano Pisano, Italy.

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On March 25, Rt. Rev. Msgr. J. F. Stedman, editor of "My Sunday Missal", died at the age of 50.

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100 years ago Pope Gregory XVI died, and was succeeded by Pope Pius IX.

DIGNITIES

Massimo Cardinal Massimi has been appointed Prefect of the Supreme Tribunal of the Apostolic Signatura, succeeding the late Enrico Cardinal Gasparri.

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His Eminence, Francis Cardinal Spellman, Archbishop of New York, honored Georgetown University at its medical school's commencement on March 17 by accepting the degree of Doctor of Laws. His Eminence's nephew, Robert M. Spellman, was among those receiving degrees.

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August Cardinal Hlond, Archbishop of Poznan and Primate of Poland has been transferred to the Archdiocese of Warsaw.

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Thomas Cardinal Tien received an honorary degree from Creighton University.

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Most Rev. Gerald P. O'Hara, D.D., J.C.D., Bishop of Savannah-Atlanta, has been named Regent of the Apostolic Nunciature in Scutari, Albania, taking the place of Archbishop Baptist Leo Nigris, who left Albania in 1943.

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Most Rev. David Mathew, Auxiliary Bishop of Westminster, has been named Titular Archbishop of Pelusium and Apostolic Delegate to South Africa.

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Most Rev. Albert G. Meyer, D.D., was consecrated sixth Bishop of Superior, on April 11 in the Cathedral of St. John, Milwaukee. Most Rev. Moses E. Kiley, D.D., Archbishop of Milwaukee, was consecrator; Most Rev. Aloisius J. Muench, D.D., Bishop of Fargo, and Most Rev. William P. O'Connor, Bishop of Madison, were the co-consecrators. The sermon was preached by Most Rev. Raymond A. Kearney, D.D., Auxiliary Bishop of Brooklyn.

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On May 28, Most Rev. John R. Hagan, D.D., was consecrated in St. Agnes' Church, Cleveland, Titular Bishop of Limata and Auxiliary Bishop of Cleveland, by Most Rev. Edward F. Hoban, D.D., Bishop of Cleveland. The co-consecrators were Most Rev. James A. McFadden, D.D., Bishop of Youngstown, and Most Rev. John P. Treacy, D.D., Coadjutor Bishop of La Crosse. The sermon was preached by Rt. Rev. Msgr. William L. Newton.

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Most Rev. Gerald C. Murray, C.Ss.R., D.D., Coadjutor with right of succession of the Archdiocese of Winnipeg, has taken over the direction of the Archdiocese, following the retirement of Most Rev. Arthur A. Sinnott due to ill health.

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Most Rev. George Leon Landey, D.D., Bishop of Hearst, Ontario, was consecrated by the Most Rev. Apostolic Delegate to Canada and Newfoundland, Ildebrando Antoniutti.

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On May 1, Most Rev. Maurice Roy, D.D., was consecrated Bishop of Three Rivers by His Eminence, Rodrigue Cardinal Villeneuve, Archbishop of Quebec, the co-consecrators being Most Rev. Albini LaFortune, D.D., Bishop of Nicolet, and Most Rev. Arthur Douville, D.D., Bishop of St. Hyacinth. The sermon was delivered by Most Rev. Alexander Vachon, D.D., Archbishop of Ottawa.

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Most Rev. John C. Cody, D.D., Bishop of Victoria, British Columbia, has been appointed Titular Bishop of Elatea and Coadjutor to the Most Rev. Thomas Kidd, D.D., Bishop of London, Ontario.

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Most Rev. John F. D'Alton, D.D., Bishop of Meath, has been named Archbishop of Armagh and Primate of All Ireland, succeeding Cardinal MacRory.

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Most Rev. Joseph Rummel, D.D., Archbishop of New Orleans, accepted the degree of Doctor of Laws from Duquesne University at its annual commencement, June 2. Honorary degrees were also conferred by the University on Francis Chilton and Generoso Pope.

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Rt. Rev. Msgr. Honore Van Waeyenbergh, Rector of the Catholic University, Louvain, touring the United States with the heads of three other Belgian universities under the auspices of the Belgian-American Educational Foundation, studying American education and arranging for student and professor exchange, received the degree of Doctor of Laws at the fifty-seventh annual commencement of The Catholic University of America, June 12.

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On May 26, at the 87th annual commencement of St. Bonaventure's College, the degree of Doctor of Letters was conferred on Rt. Rev. Msgr. M. A. Schumacher and on Thomas F. O'Connor, of Syracuse, President of the American Catholic Historical Association, who gave the commencement address. The degree of Doctor of Laws was conferred on Thomas Edward Hanley and J. Eugene McMahon.

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Very Rev. Clement Neubauer, O.F.M. Cap., of Milwaukee, has been named by our Holy Father General of the Order of Friars Minor, succeeding Father Donatus, of Welle, Belgium, retiring because of ill health.

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Dom Dominique Nogues, O.C.S.O., Abbot of Thyadeuc, Brittany, was elected Abbot General of the Order at a meeting of the General Chapter at Citeaux Abbey, near Dijon, attended by fifty-five abbots.

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Brother Athanas Emile, 66-year-old Christian Brother, was elected Superior General of the Congregation, succeeding Brother Junian Victor, who died in 1941.

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Rt. Rev. Msgr. Lucien J. Caillouet has been appointed Vicar General of the Archdiocese of New Orleans.

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Very Rev. Francis P. Smith, C.S.Sp., has been named President of Duquesne University, succeeding Very Rev. Raymond V. Kirk, C.S.Sp., who resigned because of ill health.

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Dr. Rudolf Koestler, professor of ecclesiastical law in the University of Vienna, Austria, was elected Dean of the School of Law for the scholastic term 1946-1947.

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The following have been raised to the rank of Protonotary Apostolic: Rt. Rev. Msgr. Francesco Lardone, Coordinator of Studies of the Ecclesiastical Schools of The Catholic University of America; Rt. Rev. Msgr. Michael L. Kerper, of the Archdiocese of Dubuque; Rt. Rev. Msgr. Peter J. Hart, of the Diocese of Trenton; Rt. Rev. Msgr. W. J. Nold, of the Diocese of Dallas.

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The following were promoted to the rank of Domestic Prelate: Rt. Rev. Msgrs. Francis J. O'Connor, Joseph J. Rapien, Alfred G. Thompson, Curtis J. Hornsey, George J. Hildner, John P. Cody, Joseph A. Vogelweid, Fiorenzo Lupo, Joseph F. Lubeley, Edward A. Rogers, and William A. Hamtil, of the Archdiocese of St. Louis; Michael J. Farrelly, Wenceslaus C. Hradecky, John Fred Kriebs, Daniel J. Lenihan, Michael J. Martin, Alfred P. Meyer, Charles J. Miller, Francis P. Mulligan, Richard P. Murphy, Thomas J. Rooney, and Joseph J. Zeyen, of the Archdiocese of Dubuque; William J. McConnell, Edward J. Dunphy, Michael H. Callahan, Patrick J. Clune, Edward A. Cahill, John P. Burke, John F. Baldwin, and Joseph T. Casey, of the Diocese of Trenton.

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The following have been promoted to the rank of Papal Chamberlain: Very Rev. Msgrs. Edward H. Prendergast, Charles H. Helmsing, Henry E. Stitz, John W. Marren, George Dreher, John J. Martin, Rudolph B. Schuler, Mark S. Ebner, and John S. Moser, of the Archdiocese of St. Louis; Arthur J. Breen, Raymond P. Duggan, and Timothy J. Gannon, of the Archdiocese of Dubuque; Emmett A. Monahan, of the Diocese of Trenton; Sylvester

J. Holbel, Eugene A. Loftus, John J. McMahon, and Stanislaus J. Sierakowski, of the Diocese of Buffalo; John T. Gulczynski and W. J. Bender, of the Diocese of Dallas.

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The following have been raised to the rank of Knight of St. Gregory: Julius F. Smietanka, James F. Burns, Clement A. Berghoff, Ivan A. McKenna, Joseph P. O'Hern, Dr. Italo F. Volini, and David F. Bremmer, Sr., of the Archdiocese of Chicago; Prof. William G. Heitkamp, Dr. J. J. Murphy, Dr. John E. O'Keefe, and Charles J. Schrup, of the Archdiocese of Dubuque; Godfrey W. Schroth, Robert F. McGrory, Dr. Robert E. Mulholland, and Judge John J. Rafferty, of the Diocese of Trenton.

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The following were raised to the rank of Papal Chamberlain of the Sword and Cape: Francis P. Matthews, of Omaha, and Charles Adelbert Bretitung, of Brownsville, Texas.

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The following have been given the Papal Cross *Pro Ecclesia et Pontifice:* Simon A. Baldus, Thomas Andresen, and Mrs. Elizabeth Brennan, of the Archdiocese of Chicago; Marine Sgt. Louis Maloof, former New Orleans newspaperman and acting secretary of Thomas Cardinal Tien.

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The following were given the medal *Pro Ecclesia et Pontifice:* Mrs. J. A. Wicke and Mrs. J. G. Lemmer, of the Archdiocese of Dubuque.

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In recognition of the outstanding service rendered by Catholic Schools in the sale of war bonds and stamps, the United States Treasury Department presented a medal to Monsignor Frederick G. Hochwalt, Director of the Education Department of the National Catholic Welfare Conference.

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The ten-year-old Catholic University, Bolivariana, Medellin, Colombia, has been raised to the rank of a Pontifical University.

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On May 15 the University of Notre Dame conferred an honorary degree of Doctor of Laws on Chester W. Nimitz, Admiral of the Fleet.

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Paul Claudel, Count Charles de Chambrun, and Robert D'Harcourt have been chosen members of the French Academy.

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Dr. Carlton J. H. Hayes, 1946 Laetare Medalist, is the sixty-fourth recipient of that honor.

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G. Howland Shaw, winner of the 1945 Laetare Medal, was awarded this year the third annual Pope Leo XIII medal for his work in the social field.

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The Kober Foundation Medal in Medical Research has been awarded by Georgetown University to Dr. Oswald Theodore Avery, whose work over a period of thirty-two years with the Rockefeller Institute for Medical Research has contributed widely to the knowledge of the history and the biochemistry of the pneumococcus, and who was selected for the honor by the Association of American Physicians.

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Mayor William O'Dwyer of New York presented Lt. Gen. Tadeusz (Bor) Komorowski the City's Citation for Distinguished Public Service.

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Max Jordan, N.C.W.C. news correspondent in Europe, has received the European-African-Middle East Campaign Ribbon for outstanding and conspicuous service with the armed forces.

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Humphrey E. Desmond, general manager of "The Catholic Herald and Citizen" of Milwaukee, was elected President of the Catholic Press Association at its thirty-fifth annual convention in Boston, May 23-25.

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Henry Ford II has been awarded the 1946 Christian Culture Medal by Assumption College, Windsor, Ontario.

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Dr. Roy J. Deferrari, Secretary General of The Catholic University of America, was among the twenty-six American educators invited to Japan by General Douglas MacArthur for the purpose of revamping the Japanese system of education.

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Mrs. Joy Seth Hurd, a convert and wife of a Cuyahoga County, Ohio judge, the mother of fifteen children, with five sons previously in the service, has been chosen the Catholic Mother of 1946 by the National Conference on Family Life.

THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

I. (a) Date: April 11, 1946.

(b) Title: Borrowings in Roman Law and Christian Thought.

(c) Author: Miriam Theresa Rooney, LL.B., M.A., Ph.D.

(d) Abstract: The parallel development of Roman Law and Christian thought in which is apparent a wholeness as is especially manifest in Bracton in whom Roman Law, Canon Law, Common Law, and Scholastic Philosophy met. This wholeness was in marked contrast to the departmentalization apparent in modern thought, a wholeness that may hold hope for the departmentalized political condition of the world.

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The final conference of 1945-1946 was held at The Catholic University Law School in the St. Thomas More Law Library, McMahon Hall on Thursday, May 16, 1946.

Papers were read as follows:

International Self-Help by Rev. Jerome D. Hannan, LL.B., S.T.D., J.C.D., The Catholic University of America School of Canon Law, Magister of the Riccobono Seminar of Roman Law in America.

The Rights of Smaller Nations, by His Excellency, Hussein Ala, Ambassador Extraordinary and Plenipotentiary of Iran.

The New Federal Rules of Criminal Procedure, by Tom C. Clark, A.B., LL.B., LL.D., Attorney General of the United States.

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The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

Before the adoption of the Constitution, attempts were made in some of the colonies and states to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well....

...at the first session of the first Congress the amendment...was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted....Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.—Chief Justice Waite in *Reynolds* v. *United States* (1878), 98 U.S. 145.

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